15-425 190

RECORD, CASE No. 14,378.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 328.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

ALBERT L. BABCOCK, AS ADMINISTRATOR OF THE ESTATE OF HUGH M. MUNRO, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 24, 1890.

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INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	1½	1
Caption	2	2
Transcript from State court	3	2
Summons	3	2
Complaint	4	3
Petition for removal	10	6
Bond for removal	12	7
Demurrer to complaint	14	9
Clerk's certificate	14	9
Order overruling demurrer	16	9
Answer	18	10
Reply	21	11
Order beginning trial	23	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 7, 1893.

	Original.	Print.
Names of jurors	24	12
Order concluding trial	26	13
Verdict	27	13
Judgment	29	14
Plaintiff's bill of costs and disbursements	31	14
Notice of taxation of costs	32	15
Order taking motion for new trial under advisement	34	16
Order overruling motion for new trial	36	16
Order allowing bill of exceptions	38	16
Bill of exceptions	40	17
Statute of Minnesota	41	17
Testimony of Maggie Monroe	41	18
Wm. O'Rourke	42	18
W. H. Smith	43	19
R. Linklater	45	20
W. H. Smith (recalled)	49	23
C. W. Rossiter	52	25
M. H. Lashorn	59	29
Wm. O'Rourke (recalled)	66	34
Patrick Goherty	68	35
W. H. Smith (recalled)	83	45
Charge to jury	84	46
Exceptions to charge	96	53
Defendant's requests	97	53
Judge's certificate	100	55
Notice as to bill of exceptions	101	55
Præcipe for writ of error	103	56
Assignment of errors	105	56
Bond	109	58
Citation	112	59
Proof of service of citation	113	59
Clerk's certificate	114	60

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Albert L. Babcock, as administrator of the estate of *the estate of* Hugh M. Munro, deceased, as plaintiff and The Northern Pacific Railroad Company as defendant, a manifest error hath happened, to the great damage of the said defendant, The Northern Pacific Railroad Company, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 114th year.

U. S. Circuit Court Seal, Dist. of Minnesota.

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

1½ UNITED STATES OF AMERICA, *District of Minnesota,* } *ss:*

The Answer of the Judges of the Circuit Court of the United States for the District of Minnesota, in the Eighth Circuit, in within Writ Mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America, within mentioned, in a certain schedule to this writ annexed, marked A, as within it is commanded.

Witness the Hon. *Morrison R. Waite,* Chief Justice of the Supreme

U. S. Circuit Court Seal, Third Division, Dist. of Minnesota.

Court of the United States of America, at Saint Paul, in the District of Minnesota, this 30th day of September, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth year.

OSCAR B. HILLIS,
Clerk U. S. Circuit Court, Dist. of Minnesota.

2 SCHEDULE "A."

UNITED STATES OF AMERICA:

ALBERT L. BABCOCK, as Administrator of the Estate of Hugh M. Munroe, Deceased, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota, of the June term, A. D. 1889, of said court, held in the city of St. Paul, in said district, in the year 1889.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 29th day of November, A. D. 1888, came the plaintiff, by his attorneys, and filed in the office of the clerk of said court his return from the district court of Hennepin county in the words and figures as follows, to wit:

3 STATE OF MINNESOTA,
County of Hennepin.

District Court, Fourth Judicial District.

ALBERT L. BABCOCK, Administrator of the Estate of Hugh M. Munro,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.
Summons.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which is hereto attached and herewith served on you, and to serve a copy of your answer to the said complaint on the subscribers at their office, No. 560 Temple court, Minneapolis, Minnesota, within twenty days after the service of this summons upon you, and if you fail to answer the said complaint within the time aforesaid the plaintiff will have the amount he is entitled to recover ascertained by the court or under its direction, and take judgment for the amount so ascertained and for his costs and disbursements.

Dated November 5th, 1888.

BENTON, PLUMLEY & HEALY,
Attorneys for Plaintiff.

4 (Fol. 1.) STATE OF MINNESOTA, } *County of Hennepin.* }

District Court, Fourth Judicial District.

ALBERT L. BABCOCK, Administrator of the Estate of Hugh M. Munro, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.
} Complaint.

The plaintiff in the above-entitled action, for his complaint against the defendant therein, alleges—

That on the 10th day of January, A. D. 1888, at or near a station on the Northern Pacific railway, in the Territory of Montana, known as Gray Cliffe, one Hugh M. Munro died intestate, being a resident of the county of Park, in said Territory of Montana. (Fol. 2.)

That thereafter such proceedings were duly had in the probate court in and for said county of Park, which said court *of* a court of record and had jurisdiction of the subject-matter, that on the 4th day of May, 1888, letters of administration were duly issued out of and under the seal of said court to this plaintiff upon the estate of said intestate, and this plaintiff was by this court duly appointed administrator of said estate and thereupon accepted said trust and entered upon the performance of his duties as such administrator; and this plaintiff since said date has been and now is the administrator of the estate of said Hugh M. Munro, deceased, and has duly (fol. 3) filed a certified copy of his said letters in the probate court in and for said county of Hennepin, in the State of Minnesota.

5 That the defendant, The Northern Pacific Railroad Company, on the 10th day of January, 1888, was, ever since has been, and now is a corporation duly created, organized, and incorporated under and by virtue a certain act of Congress of the United States of America approved July 2nd, 1884, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and the certain act or acts of said Congress supplementary thereof and amendatory (fol. 4) thereto, and the said defendant corporation on the said 10th day of January, 1888, was, for a long time prior thereto had been, and now is the owner of and in the exclusive operation and conduct of a certain line or system of railway within the State of Minnesota and running in a westerly direction through and beyond the boundary of said State and through and beyond the said Territory of Montana to the Pacific coast of the United States. (Fol. 5.)

And the said defendant corporation on the said 10th day of January, 1888, was, and for a long time prior thereto had been and now is operating and conducting its said line of railway as a common carrier of passengers and freight for hire within said State of Minnesota and within said Territory of Montana, and was and is doing a regular railway business within said State and Territory. (Fol. 6.)

That while so owning, controlling, and operating said line of

railway the said defendant did employ divers large numbers of servants and employees to work, manage, and operate its said railway for hire and reward by said defendant paid, and did in its conduct of said business at and during the time aforesaid,
6 by its officers, agents, and managers, employ, set at work, and direct the work, employment, conduct, and duties of its servants and employees in and about the operating of said railway as aforesaid.

That on the said 10th day of January, 1888, the said Hugh M. Munro, now deceased, was in the employ of the said defendant corporation within the Territory of Montana in the capacity of (fol. 7) locomotive engineer for hire and reward by the said defendant paid, and that the duty of running a locomotive engine upon said defendant's line of railway within said Territory was by said defendant assigned to said Hugh M. Munro on the said 10th day of January, 1888, and the defendant directed and ordered the said Hugh M. Munro to run a certain locomotive engine, the property of said defendant, known as engine number 161, over and upon its said railway in said Territory; that prior to and at the time the said orders were so presented to (fol. 8) said Munro there had been and then was a severe snow-storm in progress, and defendant's line of railway over and upon which said Munro was so ordered to run said engine was covered with drifting snow theretofore accumulated thereon and then fast accumulating, notwithstanding which the said defendant corporation did wilfully, improperly, negligently, and carelessly refuse and neglect to send a snow-plow ahead of said engine No. 161 to clear the snow and ice from said defendant's said track which had accumulated and was accumulating (fol. 9) thereon by reason of said storm, so as to render the passage of said engine number 161 safe and proper.

That there was attached to the forward part of said engine No. 161 a certain attachment known as a pilot plow, an appliance
7 constructed thereon for the purpose of clearing the *the* railway of snow and ice accumulated thereon and render safe the passage of the engine to which said plow was attached over and upon said railway of defendant. (Fol. 10.)

That on the said 10th day of January, 1888, the said defendant corporation knowingly, wilfully, negligently, and carelessly allowed to be and remain upon said engine No. 161, attached thereto as aforesaid, a certain pilot plow, the iron braces, bolts, and rods of which were broken, imperfect, and insufficient, by reason of which condition the said plow was loose and insufficiently secured to the pilot of said engine, allowing the said pilot to raise up and ride over obstructing snow and ice instead of cutting through the same, as was the intention of its construction, rendering the running of said engine upon said railway dangerous, and that the said defendant well (fol. 11) knew of the broken, defective, and dangerous condition of said engine No. 161 at the time the said Hugh M. Munro was so ordered to run the same upon and over said railway, notwithstanding which the said defendant corporation did negligently and carelessly furnish to said Hugh M. Munro said engine with the said

broken and imperfect pilot plow attached thereto to run over and upon its said line of railway. (Fol. 12.)

That while said Hugh M. Munro was running said engine in the performance of his duty as such engineer and pursuant to the orders of said defendant corporation and before daylight on said 10th day of January, 1888, near Gray Cliff, in said Territory of Montana, the said engine struck an accumulation of snow and ice which said defendant had carelessly and negligent allowed to accumulate upon its said railway track, and the pilot plow of said engine,
8 by reason of its broken, loose, and imperfect condition aforesaid, did ride upon said accumulation of snow and ice, thereby derailing said engine and throwing the same from said railway track, whereby the said Hugh M. Munro was instantly killed.

The said Hugh M. Munro was then and there more than twenty-one years of age, and left surviving his widow, Margaret A. Munro, and one daughter, Margaret Hughena Munro, born in the month of April, 1886, and there was born to said widow, the fruit of said marriage, on the 21st day of July, 1886, another daughter, Lila McCleod Munro, who are now the sole heirs of said deceased.

That the law of the Territory of Montana governing actions for recovery of damages for causing death was on the 10th day of January, 1888, and now is sections 13 and 14 of title (fol. 13) II of chapter I of the first division of Code of Civil Procedure of the Territory of Montana; which said sections of said law of said Territory are in the words and figures following, viz:

"SECTION 13. A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, or a guardian for the injury or death of his ward." (Fol. 14.)

"SECTION 14. Where the death of a person not being a minor is caused by the wrongful act or neglect of another his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his action, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just."

9 That by reason of the wrongful act and neglect of said defendant (fol. 15) corporation herein alleged and the said law of the said Territory of Montana a cause of action hath accrue- to this plaintiff to have and recover of the said defendant, for the use and benefit of the estate and heirs of the said Hugh M. Munro, deceased, the sum of twenty-five thousand dollars.

Wherefore plaintiff demands judgment against defendant for the sum of twenty-five thousand dollars and for his costs and disbursements in this action.

Dated November 5th, 1888.

BENTON, PLUMLEY & HEALY,
Attorneys for Plaintiff.

(Endorsed:) Filed November 26th, 1888. E. J. Davenport, clerk.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

S. A. Plumley, being first duly sworn, on his oath says that he is one of the attorneys for the plaintiff in the above-entitled action; that he knows the contents of the foregoing complaint, and that the same is true to the best of his knowledge, information, and belief; that the reason why this verification is not made by the plaintiff is that said plaintiff resides without the county of Hennepin, the county wherein resides his said attorney.

S. A. PLUMLEY.

Subscribed and sworn to before me on this 5th day of November, 1888.

[NOTARIAL SEAL.] FRANK HEALY,
Notary Public.

10 STATE OF MINNESOTA, } ss:
County of Hennepin, }

District Court.

ALBERT L. BABCOCK, Administrator of the Estate of Hugh M. Munro, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.
} Petition for Removal to United States Court.

To the honorable the court aforesaid:

The Northern Pacific Railroad Company, the defendant in the above-entitled action, respectfully shows *it* that it is a corporation organized and existing under the laws of the United States of America, to wit, that certain act of Congress approved July 2, A. D. 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and the several subsequent acts and joint resolutions of Congress relating to the same subject-matter; that the above-entitled action has been commenced and is yet pending in this court; that the date of the commencement of said action was November 6th, 1888, and the same has not yet been tried; that the amount in controversy in the said suit exceeds the sum of two thousand dollars, exclusive of costs, as will more fully appear by reference to the complaint therein; that the time to answer the complaint has not expired and will not expire until November 26th, 1888, and that by reason of the premises the petitioner is entitled, under the acts of Congress for such
11 cases made and provided, to remove the said suit into the circuit court of the United States for the district of Minnesota for the proceedings therein, and to that end herewith tenders to this court proper and sufficient surety for the doing by it of the several things required by the said acts to be done upon the removal of a cause from a State court into a United States court.

Wherefore your petitioner prays that the said surety may be accepted, and that this court proceed no further in the said cause, and that the same be transmitted to the circuit court of the United States for further proceedings therein.

Dated November 19th, 1888.

JOHN C. BULLITT, JR.,
Attorney for Petitioner, St. Paul, Minn.

STATE OF MINNESOTA, *Ramsey County,* } ss:

Personally came before me the undersigned, John C. Bullitt, Jr., attorney for the petitioner in the foregoing petition, and, having been by me first duly sworn, did depose and say that the several allegations of the foregoing petition are true to the best of his knowledge, information, and belief.

JOHN C. BULLITT, JR.

Subscribed and sworn to before me on the 19th day of November, A. D. 1888.

[NOTARIAL SEAL.]

H. STARIN,
Notary Public, Ramsey County, Minn.

(Endorsed:) Filed Nov. 24th, 1888. E. J. Davenport, clerk, by C. B. Tirrell, deputy.

12 STATE OF MINNESOTA, *County of Hennepin,* } ss:

ALBERT L. BABCOCK, Administrator of the Estate of Hugh M. Munro, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Bond on Removal to United States Court.

Know all men by these presents that we, John C. Bullitt, Jr., as principal, and N. C. Thrall and J. H. Ames, all of St. Paul, Minnesota, sureties of the Northern Pacific Railroad Company, are held and firmly bound unto Albert L. Babcock, the plaintiff in the above-entitled suit, in the penal sum of five thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we hereby bind ourselves and our executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seal- and dated on the 19th day of November, A. D. 1888.

Whereas the said Northern Pacific Railroad Company has filed its petition in the court aforesaid, praying for the removal into the circuit court of the United States for the district of Minnesota of the above-entitled suit, under and by virtue of the acts of Congress for such cases made and provided:

Now, therefore, if the said Northern Pacific Railroad Company shall enter in the circuit court of the United States for the district

of Minnesota on the first day of its next session hereafter — copy of the record in the said suit and shall pay all costs that may be awarded by the said circuit court if said court shall hold such suit was wrongfully or improperly removed thereto, in such case the above-written obligation to be void, but otherwise to remain of full force and effect.

JOHN C. BULLITT, JR.
N. C. THRALL.
J. H. AMES.

Signed, sealed, and delivered in presence of—
JAS. E. NAHONEY.
H. STARIN.

13 STATE OF MINNESOTA, } ss:
County of Ramsey, }

Personally came before me this day, the undersigned, a notary public in and for the said county, John C. Bullitt, N. C. Thrall, and J. H. Ames, the same persons who signed and sealed the foregoing instruments, and they acknowledged that they executed the same as their free act and deed.

Dated November 19th, 1888.

H. STARIN,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minn.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Personally came before the undersigned N. C. Thrall and J. H. Ames, the same persons who signed and sealed the foregoing instrument, and each, having been first duly sworn, did depose and say that he is resident and freeholder of this State, and worth the sum of five thousand dollars above debts, liabilities, and property exempt from levy and sale under execution.

N. C. THRALL.
J. H. AMES.

Subscribed and sworn to before me on this 19th day of November, A. D. 1888.

H. STARIN,
Notary Public, Ramsey Co., Minn.

The within bond is hereby approved and accepted.
Dated November 24th, A. D. 1888.

JOHN P. REA,
Judge District Court.

Filed Nov. 24th, A. D. 1888.

E. J. DAVENPORT, *Clerk,*
By C. B. TIRRELL, *Deputy.*

14 STATE OF MINNESOTA, }
County of Hennepin. }

District Court.

ALBERT L. BABCOCK, Administrator of the Estate of Hugh M. Munro, Deceased,
vs.
NORTHERN PACIFIC RAILROAD COMPANY. } Demurrer.

The defendant in the above-entitled action demurs to the complain*ant* herein upon the ground that said complaint does not state facts sufficient to constitute a cause of action against said defendant.

Dated Nov. 19th, 1888.

JOHN C. BULLITT, JR.,
Attorney for Defendant, St. Paul, Minn.

(Endorsed:) Filed Nov. 26, 1888. E. J. Davenport, clerk, by C. B. Tirrell, deputy.

STATE OF MINNESOTA, }
County of Hennepin, } *ss:*

District Court, Fourth Judicial District.

I, E. J. Davenport, clerk of the above-named court, do hereby certify that I have compared the papers-writing to which this certificate is attached with the original summons, complaint, petition, bond, and order removing cause to the United States circuit court in the action therein entitled, as the same appears of record and on file in the said clerk's office, at the court-house, in said Hennepin county, and find the same to be a true and correct copy thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Minneapolis, this 28th day of November, A. D. 1888.

[SEAL OF COURT.] E. J. DAVENPORT, *Clerk*,
By H. J. ALTNOW, *Deputy*.

(Endorsed:) Filed Nov. 29, 1888. Oscar B. Hillis, clerk.

15 And afterwards the following proceeding, among others, was had on the 11th day of December, A. D. 1888, in words as follows, to wit:

16 United States Circuit Court for the District of Minnesota.

Term Minutes, December Term, A. D. 1888, December 11th, 1888.

ALBERT L. BABCOCK, Admin., etc.,
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

Defendant's demurrer to the bill of complaint having been heretofore fully argued, duly submitted, and by the court taken under advisement—

Now, the court, after due consideration thereof, *and* being fully advised in the premises, it is ordered that said demurrer be, and the same is hereby, overruled and denied.

It is further ordered that defendant file its answer within five days from date hereof.

T. M. "H," page 107.

17 And afterwards, on the 14th day of December, A. D. 1888, came the above-named defendant, by its attorneys, and filed in the office of the clerk of said court its answer in words and figures as follows, to wit:

18 United States Circuit Court, District of Minnesota.

ALBERT L. BABCOCK, Administrator of the Estate of Hugh M. Munro, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Answer.

Said defendant, for its answer to the complaint herein, admits that it is a corporation and the owner and operator of a line of railway substantially as alleged in said complaint; that on January 10th, 1888, the said Hugh M. Munro was in defendant's employ in the Territory of Montana as a locomotive engineer, and was killed by the derailment of his engine in said Territory of Montana, and that on said January 10th, 1888, sections 13 and 14 of title 2 of chapter 1 of the first division of the Code of Civil Procedure of the Territory of Montana *is* substantially as set out in said complaint.

Further answering, said defendant denies each and every allegation in said complaint contained, save as hereinbefore expressly admitted, and specifically denies that by reason of any of the matters or things therein set forth the cause of action has accrued to said plaintiff to recover of the said defendant, for the use and benefit of the estate and heirs of the said Hugh M. Munro or otherwise, the sum of twenty-five thousand dollars ($25,000) or any other sum.

19 For a further defense of said action said defendant alleges that the death of said Munro was caused solely by said Munro's own negligence and not by any negligence of said defendant or any of its servants or employees.

Wherefore said defendant prays to be hence dismissed with its costs and disbursements in this action.

Dated December 14th, 1888.

JOHN C. BULLITT, JR.,
Attorney for Defendant, St. Paul, Minnesota.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Jno. C. Bullitt, Jr., came before me personally and, being duly sworn, doth say that he is an officer, to wit, ass't counsel, of defend-

ant in the above-entitled action; that the foregoing answer *it* true of his own knowledge except as to those matters therein states on information and belief, and as to those matters he believes it to be true.

JNO. C. BULLITT, JR.

Subscribed and sworn to before me this 14th day of December, A. D. 1888.

S. S. STARIN,
Notary Public, Ramsey County, Minnesota.

(Endorsed:) Filed Dec. 14th, 1888. Oscar B. Hillis, clerk.

20 And afterwards, on the 2nd day of January, A. D. 1889, came the plaintiff above named, by his attorneys, and filed in the office of the clerk of said court his reply to the answer of the defendant in the words and figures as follows, to wit:

21 United States Circuit Court, District of Minnesota.

ALBERT L. BABCOCK, as Administrator of the Estate of Hugh M. Munro,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY. } Reply.

And now comes the plaintiff in the above-entitled action, and for his reply to the answer of the defendant herein alleges:

Plaintiff denies that the death of the said Hugh M. Munro was caused solely or otherwise by said Munro's own negligence.

Wherefore plaintiff asks judgment as in his complaint prayed.

BENTON, PLUMLEY & HEALY,
Attorneys for Plaintiff.

Dated January 1st, 1889.

STATE OF MINNESOTA, }
County of Hennepin, } *ss:*

I, S. A. Plumley, on oath say that I am one of the attorneys for the plaintiff in the above-entitled action; that I know the contents of the foregoing reply, and that the same is wholly true to the best of my knowledge, information, and belief; that the reason why this verification is not made by the plaintiff herein is that he, the said plaintiff, is absent from and resides without the county of Hennepin, where reside his attorneys.

S. A. PLUMLEY.

Subscribed and sworn to before me on this 1st day of January, 1889.

JESSIE T. SESSIONS,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed:) Filed January 2nd, 1889. Oscar B. Hillis, clerk.

22 And on the same day the following proceedings, among others, were had in the words and figures as follows, to wit:

23 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1889, July 2nd, 1889.

ALBERT L. BABCOCK, Administrator, &c., vs. THE NORTHERN PACIFIC RAILROAD COMPANY. } T. M. "H," page 243.

This cause being regularly called for trial, the plaintiff appears by his attorneys, Benton, Plumley and Healy, and the defendant by its attorney-, W. H. Bliss and T. R. Selmes.

Thereupon, upon motion of plaintiff's attorneys, it is ordered that a jury come, to wit, E. Truce, Frand Aga, E. B. Eldred, John Walrod, John Herman, Thomas Robinson, L. A. Normandin, John Luge, Joseph Hogg, M. H. Cole, Henry C. Bull, Fred. Pond, twelve good and lawful men, who are duly sworn to try the issues joined herein.

Whereupon the trial is proceeded with as follows:

Mr. Plumley opens the case for the plaintiff.

Maggie Mu-roe is sworn and examined on behalf of plaintiff.

Edward O'Rourke is sworn and examined on behalf of plaintiff.

W. H. Smith is sworn and examined on behalf of plaintiff.

Robert Linklater is sworn and examined on behalf of plaintiff.

And here the plaintiff rests.

R. W. Rossiter is sworn and examined on behalf of defendant.

W. H. Lashorn is sworn and examined on behalf of defendant.

And, the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until to-morrow morning at 10 o'clock.

24 United States Circuit Court.

A. L. BABCOCK, Adm'r, etc., vs. NORTHERN PACIFIC RAILROAD COMPANY. } Jurors.

	Names.	Residence.
	1. E. Truse	St. Paul.
	2. Jno. C. Herman	St. Paul.
	3. Joseph Hogg	St. Paul.
Pl'ff	4. Fred. Pond, Geo. Staples	St. Paul.
	5. Frank Ayd	St. Paul.
Def't	6. And. Lauer	St. Paul.
	7. Thos. Robinson	St. Paul.
	8. M. H. Cole	St. Paul.
	9. E. B. Eldred	St. Paul.
	10. L. A. Normandin	St. Paul.
	11. Henry C. Bull	Cokato.
Def't	12. John Rogers	St. Paul.
	John Walrod	Dean.
	Jno. Luger	Wabasha.
	Fred. Pond	St. Paul.

(Endorsed:) Filed July 2nd, 1889. Oscar B. Hillis, clerk.

25 And afterwards, on the 3rd day of July, 1889, the following proceedings of court were had in the words and figures as follows, to wit:

26 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1889, July 3rd, 1889.

ALBERT L. BABCOCK, Admin'r, &c.,
vs.
NORTHERN PACIFIC RAILROAD COMPANY. } Page 244, "H."

This day again come the parties herein, by their respective attorneys; also the jury sworn to try this cause.

Whereupon the further trial of the same is proceeded with as follows:

M. H. Lashorn is recalled and further examined on behalf of defendant.

Edward O'Rourke is recalled and further examined on behalf of defendant.

Patrick Goherty is sworn and examined on behalf of defendant.

W. H. Smith is recalled and examined on behalf of defendant.

And here the defendant rests.

Thereupon defendant's attorney moves the court to instruct the jury to find and return into court a verdict for the defendant; and said motion being fully argued by the attorneys for the respective parties, duly submitted, *and* the court, being fully advised in the premises, overruled and denies the same.

T. R. Selmes sums up for the defendant.

C. H. Benton sums up for the plaintiff.

The court instructs the jury and they retire to consider of their verdict, and, after due consultation concerning the same and being fully advised in the premises, they find, and return into court their verdict in words and figures as follows, to wit:

"We, the jury, find a verdict for the plaintiff and assess the damages to the amount of ten thousand dollars.

L. A. NORMANDIN, *Foreman.*"

27 ST. PAUL, *July 3rd*, 1889.

ALBERT L. BABCOCK, Administrator,
against
NORTHERN PACIFIC R. R. COMPANY.

We, the jury, find a verdict for the plaintiff and assess the damages to the amount of ten thousand dollars.

L. A. NORMANDIN, *Foreman.*

(Endorsed:) Filed July 3rd, 1889. Oscar B. Hillis, clerk.

28 And afterwards, on the 5th day of January, A. D. 1889, the following proceeding of court was had in the words and figures as follows, to wit:

29 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1889, July 5th, 1889.

ALBERT L. BABCOCK, Administrator of the Estate of Hugh M. Munroe, Deceased,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY. } Page 246, "H."

The jury sworn to try the above-entitled cause having heretofore, to wit, on July 3rd, 1889, found a verdict in favor of the above-named plaintiff and against the above-named defendant in the sum of ten thousand dollars—

Now, on motion of plaintiff's attorneys, it is considered, ordered, and adjudged that the above-named plaintiff do have and recover of and from the above-named defendant the aforesaid sum of ten thousand dollars ($10,000.00) so found to be due by the jury, besides his costs and disbursements herein, to be taxed, and that he have execution therefor.

Whereupon, upon motion of defendant's attorneys, it is ordered that execution herein be, and the same is hereby, stayed for the period of forty-two (42) days from date hereof.

30 And afterwards, on the 9th day of July, A. D. 1889, came the plaintiff, by his attorneys, and filed in the office of the clerk of said court his bill of costs and disbursements in the words and figures as follows, to wit:

31 In U. S. Circuit Court, District of Minnesota.

ALBERT L. BABCOCK, as Administrator of the Estate of Hugh M. Munro, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } Plaintiff's Bill of Costs and Disbursements.

Docket fees	$20 00
Disbursements.	
Certified copy of letters of administration	75
Clerk's fees to be added	14 55
Witness Fees.	
H. W. Smith, attendance 7 days at $1.50 per day	10 50
Marshal's fees on subpœna	62
Robert Linklater, attendance 7 days at $1.50	10 50
Travel from State line Minnesota to St. Paul and return, 280 miles, at 5 cents per mile	14 00
Costs taxed at	$70 92

OSCAR B. HILLIS, *Clerk.*

STATE OF MINNESOTA, } ss:
County of Hennepin, }

S. A. Plumley, being first duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled action; that the foregoing bill of costs and disbursements is just and true; that the items therein charged are such as are allowed by law, and that the disbursements therein charged were necessarily and actually paid or incurred in the above-entitled action; that the witness H. W. Smith was sworn and testified on behalf of the plaintiff upon the trial of the said action; that said action was set for trial the 25th day of June, 1889; that said witness Smith was in attendance upon said day and was daily in attendance on said court seven days, until the trial of said action, which was finished on the 3rd day of July.

That witness Linklater was in attendance upon said trial as a witness on *the* behalf of the plaintiff and was sworn and testified upon said trial, and that said Linklater was in attendance upon said court seven days; that said Linklater resides in the city of Monterey, Mexico; that he necessarily travelled from his said place of residence to the city of St. Paul to attend as a witness in said cause upon *the* behalf of said plaintiff; that by the usual traveled route from his said place of residence he travelled within the State of Minnesota from the State line to said city of St. Paul 140 miles, and that in returning to his said place of residence he necessarily by the usual traveled route within the said State traveled 140 miles.

S. A. PLUMLEY.

Subscribed and sworn before me on this 8th day of July, 1889.

JESSIE T. SESSIONS,
Notary Public. [SEAL.]

32 *Notice of Taxation of Costs.*

Please take notice that the foregoing bill of costs and disbursements will be presented to the clerk of this court for taxation and allowance on Wednesday, the 11th day of July, 1889, at ten o'clock of said day, and the amount of the same as taxed and allowed by said clerk will be entered in judgment against the defendant above named.

BENTON, PLUMLEY & HEALY,
Attorneys for Plaintiff.

To Messrs. James McNaught and John C. Bullitt, Jr., attorneys for defendant.

(Endorsed:) Filed July 9th, 1889. Oscar B. Hillis, clerk.

33 And afterwards, on the 27th day of September, A. D. 1889, the following proceeding of court was had in the words as follows, to wit:

34 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1889, Sept. 27th, 1889.

ALBERT L. BABCOCK, Admin'r,
vs.
NORTHERN PACIFIC RAILROAD COMPANY. } Page 298, "H."

Defendant's motion to set aside the verdict and vacate the judgment entered herein in this cause and for a new trial coming on to be heard, the same is fully argued, duly submitted, and by the court taken under advisemennt.

35 And afterwards, on the 3rd day of March, A. D. 1890, the following proceeding of court was had in the words and figures as follows, to wit:

36 United States Circuit Court for the District of Minnesota.

Term Minutes, Dec. term, A. D. 1889, March 3rd, 1890.

ALBERT L. BABCOCK, Administrator of the Estate of Hugh M. Munroe, Deceased,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

Defendant's motion to set aside the verdict heretofore rendered herein and vacate the judgment entered thereon and for a new trial of said cause having been heretofore fully argued by the attorneys for the respective parties, duly submitted, and by the court taken under advisement—

Now the court, after due consideration thereof, *and* being fully advised in the premises, it is ordered that said motion be, and the same is hereby, overruled and denied.

T. M., vol. 1, page 96.

37 And afterwards, on the 28th day of April, A. D. 1890, the following proceeding of court was had in the words as follows, to wit:

38 United States Circuit Court for the District of Minnesota.

Term Minutes, Dec. Term, A. D. 1889, April 20th, 1890.

ALBERT L. BABCOCK, Administrator, etc.,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

This day come the parties, by their respective attorneys, and, the motion for a new trial herein having been heretofore denied, the defendant, by its attorneys, presents to the court a bill of exceptions and also excepts to the ruling of the court in denying a motion for a new trial.

Thereupon said bill of exceptions is signed by the court and ordered to be filed and made a part of the record herein, which accordingly is done.

T. M., vol. 1, page 131.

39 And afterwards, on the same day, came the above-named defendant, by its attorneys, and filed in the office of the clerk of said court *their* bill of exceptions in the words and figures as follows, to wit:

40 Circuit Court of the United States, District of Minnesota.

ALBERT L. BABCOCK, Administrator of the Estate of Hugh M. Munro, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Bill of Exceptions.

This action was brought by Albert L. Babcock, administrator of the estate of Hugh M. Munro, deceased, claiming to be appointed such administrator by the probate court in and for the county of Park, Territory of Montana, on the fourth day of May, A. D. 1889, to recover damages for injuries received by said Hugh Munro, resulting in his death, while said Munro was engaged in the duty of running a locomotive engine for said defendant upon said defendant's line of railway within the Territory of Montana, at which time said Hugh Munro was in the employ of said defendant in the capacity of locomotive engineer for hire and reward paid by said defendant.

The action was commenced in the State courts of Minnesota, to wit, in the district court, fourth judicial district, Hennepin county, Minneapolis, was removed by defendant to the United States circuit court, and tried at the June term of this court, 1889, on the second day of July and the following days, before Honorable R. R. Nelson and a jury.

There was and is a statute of the State of Minnesota as follows, to wit:

41 "Any administrator or executor duly appointed in any other State or country may commence and prosecute any action in any court of this State in his capacity of executor or administrator in like manner and under like restrictions as a resident may do, provided that before commencing any action an authenticated copy of his appointment as such administrator is filed in the probate court of the county in which said action is to be commenced."

The pleadings in the action are a complaint by plaintiff, an answer by defendant, and a reply by plaintiff, and they are on file.

The plaintiff, to maintain the issues on his part, offered in evidence a certified copy of letters of administration issued to plaintiff by the probate court of Park county, Montana, and filed in Henne-

pin county, Minnesota, and the same was received and read in evidence. This evidence shows the appointment of plaintiff as administrator of the estate of Hugh Munro, deceased, and that an authenticated copy of his appointment as such was filed in the probate court of Hennepin county, Minnesota, before the commencement of this action.

Plaintiff, to further maintain the issues on his part, introduced as witness MAGGIE MONROE, who testified as follows:

I am the wife of Hugh Monroe. We were married in June, 1883, and lived at Livingston, Montana. My husband was an engineer on the Northern Pacific road, and had been in such employ since 1882. He was taken sick on January 2nd, and was not out again until January 9th. He was sent for by messenger at midnight on January 9th to take the passenger train out of Livingston. The weather was cold. It was blowing and snowing. I think it snowed most of the time that year. At least it was blowing so hard
42 that it seemed to be snowing all the time. It stormed so hard that I asked my husband to take a lantern with him for fear that he would lose his was to the round-house. It had been snowing hard during the day and that night. I have two children—Margaret, three years old, and Lulu, one year old.

Plaintiff, to further maintain the issues on his part, introduced as witness WM. O'ROURKE, who testified as follows:

I am a conductor and am now in the employ of the Northern Pacific Railroad Co. I was called here as a witness by them. I was conductor on the Northern Pacific on January 10th, 1888, on passenger train No. 6, between Portland and St. Paul. The train arrived at Livingston from the West at 9 o'clock p. m. January 9th, and ought to have left there at 9.20. The weather was stormy; it had been and was then snowing. The wind was blowing, and there was two feet, more or less, of snow on the level. The train was delayed until 2.55 the next morning waiting for an engine to take the train out. It was then taken out by engine No. 161, Hugh Munroe, engineer. I first saw engine No. 161 about half an hour before we left Livingston, standing on the main track near the train-dispatcher's office. I had not then coupled onto the train. I don't know where it was before that. I received orders at 2.50 a. m. to proceed and meet a snow-plow, west bound, at Elton, 12 miles east of Livingston, and also not to pass Big Timber, which was a station 33 miles east of Livingston, without orders. I proceeded with the train and met the snow-plow, at about 3.25, at Elton and then ran to Big Timber, where I received orders to meet some west-bound train east of Big Timber. There was no snow-plow preceding our train on this trip. There was a light engine went ahead of me four hours. I don't know whether this engine had a snow-plow or not.
43 It was stormy all during the night. The accident occurred about two miles west of Gray Cliff, where there was a small cut. I could not say whether the cut was filled with snow. After the train went through it pushed it all out. I think it had been

snowing for some days previous. The snow was about three feet deep in the cut. Monroe was in charge of the engine as engineer and was killed at the Gray Cliff cut.

The witness testified on cross-examination as follows:

Monroe backed engine 161 up to the train-dispatcher's office at Livingston to get orders about an hour before the train started. The engine remained there about 25 minutes, for the reason that it got stuck in a little snow and had to be shoveled out by the trackmen. The train-dispatcher said to Monroe, "It would have been much easier for you to have walked up to the office than to have backed your engine into that snow-drift and delayed this train still farther." Monroe replied, "Yes; it would have been better." The train I met at Elton had come through the cut where the accident happened and had a snow-plow on it of the same character as the one on my train, attached to the engine. The train I met at Elton passed the point where the accident occurred about two hours before the accident.

The plaintiff, to further maintain the issues on his part, introduced as witness W. H. SMITH, who testified as follows:

I have followed locomotive-engineering for twenty years. I was in the employ of the Northern Pacific railroad in January, 1888. I took engine No. 161 from Livingston to Billings, leaving Livingston about midnight of January 5th, 1888, and returned to Billings with the engine the next day, in the daytime. I discovered that the pilot plow on the engine was loose, and *when* we stopped and went out and examined it. There were four central braces from the pilot beam to the plow. The lower one on the left-hand side was broken and the upper
44 one on the right-hand side was loose. These braces were made of inch and a quarter iron. The two angle-iron braces, one on each side of the plow, were both gone entirely. I could notice in the daytime, when we were running, the plow was tetering, so I went and examined it so as to know if I could do anything for it myself. I examined it closely and made up my mind it would run as far as Livingston all right. There was not much the matter with it. There was a repair shop of the company at Livingston. I reported it there on the report book that they have in the engine-house for that purpose at about midday, January 6th. The master mechanic and Mr. Rossiter, the foreman, were in charge of the engine-house. The morning after I reported it I came in there and saw that the plow was not repaired, and I took the foreman of the shops over and show- him personally the condition of the plow and told him it was liable to give trouble of not repaired. If the plow is not solid and braced properly, it is likely to rise up and ride over the drift instead of going through it, and the natural effect would be that it would throw the engine trucks from the track. These plows are not generally supposed to serve the purpose of a regular snow-plow. The purpose of the larger snow-plows is to plow out

the heavy snow-drifts, and these pilot plows are constructed for light snow, and if properly constructed they will do very good work if the snow ain't too deep. They will keep the snow out in very good shape. I should judge the cut at Gray Cliffe was not more than two or three feet deep; maybe a little more. I shouldn't judge it to be more than six rods in length. There is a fill-up there where the trouble was. The track is just about straight through the cut. After you get out of the cut to the fill for a short way—maybe four or six rods—it begins to curve. The weather was very
45 stormy on day prior to the accident. It was storming the morning of the fifth very hard, and it stormed three or four different times between that time and the 10th. A high wind was blowing the night of the 9th and morning of the 10th. The land about there is quite sandy, gravelly soil. I couldn't tell whether the snow that was blowing into the cut had sand with it. There might have been fourteen inches fall in that storm and perhaps more in the five days. There was not a great deal of snow before that; not in the valleys there. That was the first heavy storm we had.

The witness on cross-examination testified as follows:

I brought this engine back to Livingston on the afternoon of the 6th, and reported by writing in the proper book the consition of the braces on the engine and the plow, and on the next day, the 7th, I had a conversation with the for-man about it. His name is Whitney. I went out on the engine again at noon, on the 7th, and went to Billings. I came back from Billings with engine 161 on the evening of January 8th, and the plow was still in the condition described. I did not take the engine out after January 8th and did not know the condition of the engine when it went out with Monroe. I don't know that the braces and defective parts that I have testified to were not put in repair before the engine went out.

Plaintiff, to further maintain the issue on his part, introduced R. LINKLATER, who testified as follows:

I have been a machinist for sixteen years; was in the employ of the defendant during the year 1888 and had been in the machine shops of defendant at Livingston for three years prior to that time. My duties were to repair the engines in the round-house. The last time I saw Monroe was the morning of the accident. The last time prior to that I remember seeing him was between Christmas and New Year's, when he reported the con-
46 dition of the pilot plow on engine No. 161. The pilot plow upon that engine was not repaired, to my knowledge, after its defects had been reported by Monroe. I was in the round-house on the night Monroe left Livingston and took the engine out. I was working overtime. The pilot plow was not, to my knowledge, repaired after Mr. Smith reported it, and prior to Mr. Monroe taking it out on the morning of the 10th. I think I would have known it if it had been repaired. I was working there all the time. I

know all repairs that were put on engines in that round-house, and it could not have been repaired without my knowledge. It might possibly have been repaired in overtime when I was out there without my knowedge, but I don't believe it was. I knew the engines that were brought into the round-house for repairs. I cannot call to mind just now all repairs that were ordered on engines that were brought into the round-house. I knew the fact that such repairs were ordered on any engine in the round-house; they were down in the book. The engineer always puts his repairs in the report book. I do not remember the time exactly that engine 161 came in on the last trip. I had been working all the day before the engine went out, and I worked until about 5 or 6 o'clock in the morning. During this one night no repairs had been put upon engine 161. I don't remember whether engine 161 was in the round-house during the daytime on January 8th; it was no- there on January 9th. I saw it in the round-house that night. There was no light at all in the round-house. If there was you couldn't see them, because all the steam pipes in the round-house were bursted, or pretty much all of them, and they had to turn the steam on to keep the engines from freezing, and the steam escaped and made it so that consequently you couldn't see a lighted torch the length of your arm. It was that way all winter. I don't remem-
47 ber this particular night. It was that way pretty near all winter—nine times out of ten, when it was cold. When it was not cold, so that there was no danger of the engines freezing, they would turn the steam off, and then you could see all right. It was a pretty cold night and stormy. It had been storming near a week and the wind blowing. I didn't notice the thermometer. I think it was pretty frosty, but I don't remember very well.

Witness on cross-examination testified as follows:

My hours of work there were from 7 a. m. and until 6 p. m., with one hour for dinner. Overtime was after 6 p. m. and before 7 a. m. Engine 161 might have been repaired during overtime; I mean when I was not there. I know the engine came in the night before Monroe's death, the night of January 9th. I do not know the name of the engineer that brought it off the road. The hostler, Miles Young, brought it into the round-house. Monroe did not take it out of the round-house; he took it after it left the round-house. It is not the duty of the engineer to bring the engine in or take it out of the round-house. I saw Monroe half an hour before the engine left the round-house.

Q. Do you know the purpose for which he came into the round-house?

A. To get his engine in readiness for the trip.

Q. Did he come in and inspect the engine and look at it?

A. He wouldn't have to do that.

Q. Do you know what his duties are and what orders of the company are with regard to engineers inspecting their engines?

A. No, sir. I saw Monroe in the round-house and spoke to him. It was very cold there.

Q. And in very cold weather the steam was turned on?

A. It was turned on.

48 Q. Where were you when the engine was brought back from the wreck?

A. I was down at the wreck.

Q. Did you examine the pilot plow?

A. No, sir; I did not.

Q. Do you know anything about the condition of pilot plow at the time of the wreck?

A. I know it was loose.

Q. Please state to the jury just what you looked at when you examined it.

A. I did not examine it.

Q. You did not examine it?

Q. No, sir; because I was not ordered to.

Q. It was not your business?

A. No, sir; not without I was ordered to.

Q. Did you examine it?

A. No, sir; Monroe did not say anything to me about the pilot plow. He reported in my presence between Christmas and New Year's that something was out of repair. He was talking with the foreman about some work. We were standing by engine 161 and Monroe said that he had put down some work to be done on his engine. He was going round over the engine and he put his boot on the nose of the pilot plow and shook it up and down. He said, "Mr. Rossiter, that will be causing me some trouble if it is not fixed." This was before he was sick, between New Year's and Christmas. I am not positively sure that he took the engine out after that, but believe he did. I don't know whether he took it out before the morning of January 10th.

Q. Now, when you say you do not think any repairs were made on that plow you mean, I suppose, during the time you were there the 10 hours a day?

A. Yes, sir.

49 Q. You did not see it repaired?

A. I never did; I never saw any work done on the plow.

Q. Is that all you know about it of your own knowledge?

A. Yes, sir.

The witness on redirect examination testified as follows:

I worked nights also; was working constantly overtime, and worked overtime during the ten days preceding this accident, nights as well as days, and I do not think it was repaired any time I was working there.

The witness on cross-examination testified as follows:

I was not the only machinist there. There were 4 of us, all doing practically the same work. I was not the foreman.

The plaintiff, to further maintain the issues on his part, recalled witness W. H. SMITH, who testified as follows:

Q. State what, in your opinion, would be the prudent course of a company to take as to running a snow-plow ahead of this train No. 6 during a snow-storm such as was in progress on the night of the accident.

A. They generally run it not very far ahead of the train. If the train is on time, they run it ahead of the train's time—from five to ten minutes ahead of the train. It wouldn't take but a few minutes to fill up a cut of that kind—a small cut like that—and from what I know of the storm that was in progress on the evening of January 9th when I went to bed.

Q. You say it is customary for a snow-plow to precede a train about five minutes?

A. From five to ten minutes.

On cross-examination the witness testified as follows:

I shouldn't think it would take over half an hour in a bad storm after the snow-plow from the east had cleared it for that cut to fill up; light engine should go through the cut. I think a larger cut than that engine should go through it with the snow probably not deeper than that was. An engine will go through a cut of this size when it is filled up at intervals of half an hour. An engine with a small plow on it would go through that cut.

Q. Then, what was the necessity of a snow-plow to precede train No. 6?

A. There were larger cuts than this cut.

Q. I am talking about the cut where the accident occurred. There has nothing been said about any other cut except the cut where the accident happened.

A. What would be the necessity for that cut?

Q. What would be the necessity of a snow-plow preceding the train 5 or 10 minutes if an engine would go through without difficulty?

A. It wouldn't go through without difficulty. You would have to send an engine through at speed.

Q. It would go through?

A. Yes, sir.

Q. What would be the difficulty with engine 161 with a pilot plow and the engine behind it in going through?

A. I don't think there would be any difficulty if she had not derailed.

Q. Then what is the necessity of a snow-plow preceding the train 5 or 10 minutes?

A. I suppose if you were going to send a plow at that end they wouldn't find much difficulty there.

Q. The difficulty would be farther west?

A. Yes, sir; farther west.

Q. The worst places were farther west?

A. There were worse places than that between Livingston and Elton. There were places between Big Timber and
51 where the accident occurred.

A. Then I understand you to say that the train had got through worse places — where the accident happened—between Big Timber and Elkton?

A. Yes, sir.

A. And the accident occurred where the necessity for a snow-plow was not so great? Is that true?

A. Yes, sir.

The witness on redirect examination testified as follows:

Q. Would it make any difference about a light engine going through as to whether the pilot was in repair or not?

A. Yes, sir; it would make a difference whether the pilot plow was in repair or not.

Q. Would it make any difference whether it was a light engine or an engine and train—a heavily loaded train?

A. Well, in a cut of that length it would be an advantage to have a train.

Q. You say that going through a cut of that kind, if a snow plow didn't precede, you would have to run at a greater rate of speed in order to get through?

A. Yes, sir; you would have to run at a greater rate of speed in order to get through.

Q. Then it would have been more prudent to have a snow-plow precede?

A. Yes, sir.

The witness on recross-examination testified as follows:

Q. If the plow was loose you say that would be a disadvantage?

A. Yes, sir.

Q. In what respect?

A. In the first place, the train was running through this cut, and if it was packed with snow and much snow is blown in, if the plow is loose it is liable to rise up and go over instead of through the snow.

52 Q. Suppose the track had been cleared out within an hour and light snow had simply drifted in—light snow—would the plow undertake to ride over the snow? Wouldn't the effect be to depress it rather than to raise it?

A. Sometimes it will and sometimes it will not. I have seen that both ways. I have seen a plow break and go underneath.

Q. Isn't it a fact that a plow will not rise, even though it be loose, unless there is packed snow and ice upon the track?

A. That is generally what raises it—packed snow or ice.

Q. And where the snow is lightly drifted it bears down on the plow?

A. Yes, sir; it bears down on the plow.

Plaintiff then rests his case.

Defendant, to maintain the issues on its part, introduced as witness C. W. ROSSITER, who testified as follows:

I am now connected with the Northern Pacific Railroad Company as general foreman of the round-house at Duluth. I was master mechanic of the Northern Pacific road at Livingston from May, 1885, until March, 1888, and had supervision over all machinery, engines, and locomotive engineers on the Montana division between Billings and Helena. When engineers wanted repairs or other work done they put it in the book at the round-house or reported it to me personally. It was their duty to report in the book breakages or defects in the engine if they required anything to be done. It was also their duty to inspect their engines. There is always a necessity to change and engineer occasionally; one may be sick or laying off for any cause, and in that case the engineer takes his engine, and he is always supposed to inspect his engine before going out, not only for his own personal safety but for the safety of the company's property.

53 I recognize this copy of a book entitled "Northern Pacific Railroad, Machinery Department; Orders Governing Engineers and Other Employés." I have a number of copies of that in my office, and always keep them on hand. I am supposed to keep them on hand for the use of the men at all times. The book of orders is like all books of orders, to govern the action of the employés about their being temperate at all times and attentive to their duties, and so forth. We are supposed to give every engineer a copy. About 8 months before this accident, on account of some neglect or difficulty in the air-brake of an engine not being properly reported, the superintendent of machinery sent me about two dozen copies of this book, and also another book which controls the use of the air-brake particularly. He gave me instructions to see that every engineer was in possession of a copy of this book, and I took down the name of every man I gave them to. I am confident I gave each man a copy of that book.

Q. I will ask you whether you gave Mr. Monroe, the engineer who was killed, a copy of this book?

A. I don't remember the particular time I gave him his.

Q. Did you give him a copy of the book?

A. I can only answer by stating that I reported to the superintendent of machinery that I had given each man a copy and had taken his name.

Q. Did you report to the superintendent that you gave a copy to every man?

A. Yes, sir; I did.

Q. Was your report correct?

A. It was correct.

Plaintiff objects to this evidence as incompetent and immaterial on the ground that there is no testimony that a book of that character was given to Mr. Monroe.

54 The COURT: That is a question for the jury.

Defendant's counsel now offers in evidence rules No. 19 and 26 as found in said book.

Said rules are read to the jury by defendant's counsel, — are as follows (being rules 19 and 26 from machinery department rules):

Rule No. 19.

Engine must be taken from engine station to train by engineer, and be by him properly examined, oiled, and otherwise prepared for trip service. Except in extreme cases no part of this duty can be delegated to others, nor will it be permitted.

Rule No. 26.

Before giving up engines at round-house or engine station the machinery must be thoroughly examined in detail and report made of everything found out of order or badly worn. Particular attention must he paid to the condition of safety-valves, steam gauges, smoke-stacks, nettings, ash pans and dampers, draw-bars and couplings, wheels and axles, oil cellars, cross-heads, pumps, eccentric straps, rods.

Abuse of engine or waste of company property will not be tolerated.

I think it was the day before the accident, January 9th, just before noon, that Mr. Monroe came into the round-house and said he was ready for work. He had been sick for some days.

Q. Do you remember of any repairs being made on engine No. 161?

A. I remember the braces—they might be called braces, but they were angle irons—on the two sides of the plow, which keeps the plow in shape, and which is made in that shape to throw the
55 snow from the track. I remember these angle irons were loose, and I remember telling one of the boiler-makers to rivet these sheets, which, as I said, throw the snow from the track, to the plow. Just now I don't recollect any other work we did to the plow at that time.

Q. Was that intended to put the plow in proper order?

A. Whatever we did on the plow was supposed to be to complete the work, to put the plow in good condition; but, as I said before, I don't remember now what other work we did to the plow.

Q. My question is whether the work on that plow was intended to put it in proper condition.

A. It was.

Q. Do you recollect the precise date?

A. I cannot tell you. It was after a little storm that had accum-ated some snow, now many days before that. I remember Monroe. I met Monroe in the round-house, and I remember going to the engine and looking at the driving springs on the left side of the engine. One of our engines had broken her driving springs while standing there in the round-house. She was not moving, but was

standing in the round-house when she broke it. I went to the engine and put my foot on the plow. He had had some conversation about repairing the plow. I don't remember just exactly the repairs, what they were, but I put my foot on the plow and took hold of the draw-bar and swung on the plow to see whether it would shake loose. He was looking at the plow at the time and he seemed satisfied with it, and then I went on the left-hand side of the engine, to the tank or tender spring. We had put in two or four springs, and they were to- stiff and I called him round to see whether the engine had settled down on the springs and whether the
56 lower brace projected under the tender truck. This particular point I called to my mind because that was the point. Whether they did any other work or whether we say any other work or looked at any other work I don't remember.

Q. You say you jumped on the point of the plow?

A. Yes, sir.

Q. That was done to see whether it was loose or not?

A. Yes, sir.

Q. Was Mr. Monroe present?

A. Yes, sir; he was present.

Q. Was the plow loose?

A. It was not.

Q. You say it had been repaired?

A. Yes, sir; it had been repaired, because some time before—I can't say how long before—he had told me that that plow was loose. He had reported that these braces were loose, but I don't remember what else was loose.

Q. Was the engine No. 161, as far as you could see at that time and as far as you noticed at the time, in good order?

A. It was satisfactory to him and to myself.

Q. With regard to the angle irons, were they on the plow?

A. Yes, sir; they were on.

Q. And in good order?

A. In good order.

Q. Do you know anything about the central braces from the pilot beam to the plow?

A. I do not remember anything about these at that time. The only recollection I have is really about that engine—that I can remember the man taking a broken brace off a plow of that kind; but I couldn't say whether it was that engine.

Q. There was a foreman of the machine shops?

A. Yes, sir.

Q. You were the master mechanic?

A. I was.

Q. It was not your province to personally make the repairs?

A. No, sir.

Q. But simply to see that they were done?

A. Yes, sir.

57 Q. Did you see the plow after it was brought back from the wreck?

A. I saw it on the flat car.

Q. Do you remember anything about it?

A. I remember the angle iron on the left side was bent towards the engine as if it had been done on the engine, as if the engine had been on its left side. The plow was in the shape of an "A;" each side projected out so as to throw the snow away from the engine. The left side had been bent down toward the wheel.

Q. Did you or any one connected with your department make an examination of the plow at the time after it came back to Livingston?

A. Yes, sir; I looked it over after it came back.

Q. After it came back to Livingston, after the wreck?

A. Yes, sir. At the time I was there I made an examination. I went out there alone and made the examination alone. I don't remember being out there with any other person.

Q. What time was that?

A. Three or four weeks after the wroe-k.

Q. On the day that the engine and plow were brought back to Livingston?

A. She was brought back on Sunday afternoon or Sunday night.

Q. Who was it that made the examination for you, or for the company?

A. Nobody for me; I did it myself.

Q. What did you find with regard to the plow?

A. I don't remember anything out of the way, except that the wood-work was broken, and that but very little, and this left wing of the plow was bent toward the wheel as if the engine, after turning over, had bent that down.

58 I made an examination myself to see what was the condition of the plow. It was virtually whole, with the exception of this one bent of that side sheet, as far as I could see.

Q. Were there any supports or angle irons or braces broken?

A. I did not discover any.

Q. Would you have discovered them if they had been broken?

A. Well, the braces—the three braces—are taken off to take the plow off the engine. They were not there. The three braces seemed to be properly in their places, as far as I could see. As far as I can remember, they were all in their places.

Q. If the rods had been loose or broken would you have remembered it?

A. I think so.

Q. Do you remember whether they were or not?

A. I don't remember whether these braces were loose, any more than seeing the plow as I remember it now—seeing the plow on that flat car and looking into it and noticing that this center brace was taken off; but I went there for the purpose of seeing if I could put it onto another engine, because we were needing a plow in the snow, and my impression is, as far as I can remember, that we could repair the plow very easily, I thought, by simply straightening one sheet—the sheet that was bent.

Q. Then, if you could repair the plow by straightening that sheet the rods were in good order?

A. I should suppose they were, but so far as making a direct statement to that effect I could not do it.

On cross-examination the witness testified as follows:

It was three weeks after the accident that I saw the plow. It was in the yard at Livingston, on a flat car; it had been taken off
59 the engine. I know that the three main braces had been taken off. I cannot tell you whether in taking the plow from the engine some one or more of them had been found to be missing. The three main braces that attach the plow to the engine would have to be taken off to detach the plow from the engine. I do not remember seeing them after they were detached from the plow, after the engine was brought in. I understand that witness Smith referred to the angle irons as having come off.

The witness on redirect examination testified as follows:

Q. You say the angle irons are the ones that you understood Mr. Smith to refer to as having been gone entirely?
A. Yes, sir.
Q. And which you say were replaced before the accident?
A. Yes, sir.

The witness also produced a plan or drawing showing a similar snow-plow to the one in question, and pointed out on it the different rods and braces—those which helped connect and hold the plow to the pilot of the engine as well as those constructed in the plow—and pointed out the angle irons, and testified that these had nothing to do with attaching the plow to the pilot or bracing or holding it in position on the engine, and also testified that the number of main braces or rods which support the plow in position on the pilot differs in different plows.

The defendant, to further maintain the issues on his part, introduced as witness M. H. LASHORN, who testified as follows:

I have been in the employ of defendant since 1882; was car foreman at Livingston in January, 1888. I had charge of all repairs of cars, pilot plows, and snow-plows. I was called at 5 o'clock on the morning of the accident to go and examine this wreck. It was part of my duty to examine all the rolling stock, both engines and cars, to find out, if possible, the causes of acci-
60 dents. I went from Livingston, ahead of the wrecking train, on a large snow-plow. I examined the cars, the engine, and the wreck. The engine was lying parallel with the track and the tank at right angles. The whole train was detached from the tank of the engine, and all the cars were standing off the track at an acute angle with the track, and the engine and tank were on their sides. I examined the running gear of the engine first to see if I could find out the cause of the engine going off the track, and as far as I could see I could not find out the cause of the accident. I then examined the train and found that the truck of the baggage car was half way between the hind truck and where the front truck

should be. Everything was off the track. I examined the pilot plow, and as fas as I can remember now I found it in good condition, except that the left wing was bent where the engine had fallen over on it and bent it toward the engine. The wing is made of thin iron simply to throw the snow off. I examined the main braces of the plow, and as far as I can remember they were all whole at that time.

Q. You made a report of the fact?

A. Yes, sir.

Q. Does your memory correspond with your report?

A. I made no special report about the plow, but the report was that I could find no defects about the engine that was the cause of the wreck.

Q. When you say the engine do you mean the engine and pilot also?

A. Yes, sir; also the engine and tank.

Q. Do I understand you to say that you found no defects either about the engine or pilot plow or tank?

A. I noticed nothing. I didn't look at the angle irons. I did not consider that they were in any way endangering the engine.

61 The braces run from the foot of the plow to the main beam of *of* the engine and fasten the plow to the engine. In the first place the plow is bolted to an eight-by-ten-inch oak beam in front of the engine, with four to six one-inch bolts. Then there is a brace running from the beam of the engine—that is, this front beam—towards the end of the pilot, to the foot of the plow; and then there are two long braces that run from the side of the pilot down to the plow. Those are the only braces that I examined.

Q. How many braces in all did you examine?

A. Three braces.

Q. Please state to the jury the function of those angle irons. What purposes do those angle irons serve?

A. The angle irons do nothing but hold the wings of the pilot out.

Q. Then they don't fasten the plow to the engine?

A. They don't fasten the plow to the engine, but they hold the wings of the plow out so as to throw the snow clear off the cilinders of the engine. They are there to hold the side of the plow.

Q. Do I understand you to say that the braces are what hold the plow? The braces are for that purpose, are they not?

A. The braces are what steady the plow. The bolts hold the plow to the engine.

Q. But the braces are bolted to the plow?

A. Yes, sir—that is, they are either bolted or riveted, or riveted and bolted.

Q. Did you discover any cause for the accident?

A. I did not. I think the accident was caused by——

Objected to.

The COURT: You may state what you saw and what you discovered.

Q. How long have you been in the railroad service?

A. Since 1882 with this company.

62 Q. Any other during your term of service?

A. Yes, sir; I was railroading about three years before I came to this company.

Q. From 1879 to 1882?

A. Yes, sir.

Q. What have been your duties?

A. I have been connected with the car department the same as I *and* with this company.

Q. The same duties?

A. Yes, sir.

Q. Examining wrecks?

A. No, sir; not altogether.

Q. Did you examine wrecks, though, as part of your duty?

A. Yes, sir.

Q Is that part of your duty now?

A. Yes, sir; it is now.

Q. How long has it been?

A. For about four years.

Q. I will ask you whether you think you are able to state from your knowledge and experience as a railroad employé any cause for this accident. You can answer yes or no. Do you think you are able to give a reason for this accident?

A. I think so; yes.

Q. Do you think you can?

A. Yes.

Objected to.

The COURT: From what you discovered at that time?

A. Yes, sir.

Q. Give your statement.

A. From the way the wreck lay and the position of the cars I think it was caused by the front truck of the baggage car jumping the track; that the snow had been packed there and raised the car up a little, and the baggage had not been but very lightly loaded; had but very little freight in it, and the snow was packed close, and that raised the car from the truck, and then it jumped the rail and pulled the tank and engine over.

Q. By hitting the snow do you mean?

63 A. By the front of the engine going through the snow that would bring the train up towards the engine and raise the front truck of the baggage car off the rail. Then the whole train took a shoot off at an angle and turned the front of the baggage car half way around away from the tank, and the draw-bar and the connecting link and the safety chains connected onto the tank held on and pulled the tank over, and the tank pulled the engine over, and as the tank turned over it broke loose from the train and left

the train run straight out. The train didn't turn over, only the tank and engine.

Q. Do you understand that the engine and tank went off the track last, according to your opinion?

A. No, sir; I think the tank and baggage car went off at the same time, only the tank turned over, and the baggage car was shoved by the cars behind parallel with the track.

Q. The draw-bar and chains from the truck of the baggage car are the means by which the truck is held in position, are they not?

A. No, sir; the chains on the truck are what they call safety chains.

Q. Please describe them to the jury.

A. The safety chains—there are four of them. They are fastened to each corner of the truck, and there is a hook fastened to the body of the car and the safety chains are attached to this to hold the truck under the car if it leaves the center—that is, gets off the center pin. If the center pin breaks, this is supposed to hold the truck under the car.

Q. What is the center pin?

A. It is a pin an inch and a half thick, made of iron—that is, put down through the center of the car into the bolster, the swing-beam of the car.

64 Q. That is all that holds it except the four safety chains?

A. Yes, sir. They are hanging under there loose.

Q. They are hanging under there loose so that the car can swing around curves?

A. Yes, sir.

Q. This truck you think was forced off by the engine striking the snow, and that made the accident?

A. I think the speed of the train after the truck had rode the snow, that the speed of the train then shoved the trucks back and then shoved the baggage car off, and, the whole train following the baggage car, turned the tank over, and the tank turned the engine over when it went over.

On cross-examination the witness testified as follows:

Q. What was the purpose for which you went out to examine this wreck?

A. To see if I could find out the cause of the wreck.

Q. You examined particularly the running gear of the engine?

A. Yes, sir.

Q. You spoke of the manner in which pilot plows of this kind are fastened to the engines; you said they are attached sometimes by four bolts and sometimes by six bolts.

A. Yes, sir.

Q. How was it in regard to this plow; do you know whether it was attached with four bolts or with six?

A. No, sir; I couldn't say.

Q. You can't say?

A. No, sir. I didn't examine the plow for the purpose of seeing

how it was attached to the pilot beam, whether by four or six bolts. I examined it — see, if possible, I could find any breakage about the plow, but I did not, and I didn't find anything about the engine. I was examining more particularly the running gear and the machinery of the engine, in looking after the cause of the accident, than the plow itself. I could not state from that examination whether there were one or two heel braces. I did not examine particularly to see how the plow was attached— didn't examine these braces particularly; I didn't discover anything wrong; didn't make a critical examination of these braces in particular. I had nothing to do with engines, only as work was reported to me to be done in my line on an engine, which was the wood-work around the engine. I don't remember any repairs being made on this plow within a few days before the accident.

65

The witness on redirect examination testified as follows:

Q. You were asked, and you started to answer, the purposes of your examination of the engine and plow, and you may state that again.

A. It was to see if I could discover anything that would cause the wreck.

Q. You stated you did not examine the plow in order to determine how many braces it had?

A. No, sir; I did not.

Q. But simply — see if there was anything out of order or broken?

A. Yes, sir.

Q. Or what might cause the wreck?

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Q. Did you find anything out of order or broken, to the best of your recollection, with the braces?

A. To the best of my recollection there was nothing.

Q. Would you have found it if there had been anything of that kind?

A. Yes, sir; I should.

Q. You stated you don't remember whether there were one or two heel braces?

A. Yes, sir; I stated so.

Q. But if there had been two heel braces and one of them had been broken or removed you would have remembered that?

A. Yes, sir; because they are in a different position then.

66

By the COURT:

Q. Did you notice it?

A. No, sir.

Q. Did you find anything removed or broken?

A. No, sir.

The defendant, to further maintain the issues on its part, recalled witness O'ROURKE, who testified as follows:

I have been in the service of the Northern Pacific as conductor for nine years; was running for four winters as freight and passenger conductor.

Q. I will get you to state whether it is customary to run a snow-plow from five to ten minutes ahead of trains during snow storms of that character.

Objected to.

A. It is not always customary to run snow-plows ahead of train in storms.

Q. Of this character?

A. Yes, sir.

Q. State the reason, if you know, why a snow-plow was put upon the west-bound train that night and not upon your train.

Defendant's counsel proposes to show what the reason was for not putting a snow-plow on the east-bound train and why it was put on the west-bound train.

The COURT: The orders were that the conductor was to run to Elton, where he would meet a snow-plow going west. The accident happened east of Elton, and one of the charges made by the plaintiff is that the company did not exercise reasonable care necessary to keep a clear track. I think the testimony is proper.

Q. State the reason, if you know, why a snow-plow was put upon the west-bound train that night and not upon your train.

A. The grade is heavier going west than it is going east.

Q. For what reason would the snow-plow be put upon the train going west?

A. A train going up grade and pulling a train would necessarily have to have a clearer track in order to get through the snow, while a train going east could get through the snow of its own force, without any assistance from the plow.

67 Q. State the purpose of a snow-plow.

A. To clear the track of snow.

Q. State the reasons for clearing the track of snow.

A. To keep the trains from being stalled in the snow-drifts.

Q. Snow-plows are not used to prevent accidents?

A. No, sir; they are used to clear the track from snow and to prevent trains from being stalled.

Q. And not to prevent accidents?

A. No, sir.

Q. Have your trains during the winters that you have been engaged as conductor always had even a pilot in front of them in storms of this character?

A. I have been on trains where they had no pilot plows on, or snow-plows or anything, in stormy weather.

Q. In similar storms to this?

A. Yes, sir; in storms just as bad as this was.

Q. Without accident?
A. Yes, sir.
Q. Without being stalled?
A. No, sir; not without being stalled.
Q. Did you have any accident?
A. No, sir; we would go through without being stalled; heavier drifts than this.
Q. And without any snow-plow?
A. Yes, sir.
Q. State the character of the snow that filled this cut on the night in question. Was it packed?
A. Well, the snow drifting in over the prairie would be just the same as snow falling from the clouds. If it had drifted in it wouldn't be of any more weight and it wouldn't be harder to get through.
Q. Then you had passed the snow-plow at Elton?
A. Of course, when I went back to look at the cut the train had went through and I couldn't tell whether the snow was packed or not.
Q. The accident happened after the train had passed through the cut?
68 A. Yes, sir; the train went through the cut and went into the ditch just on the other side of the cut.
Q. Are you able to state why the snow-plow was not sent ahead of your train, No. 6?
A. I expect the train-dispatcher didn't deem it necessary.

Objection by plaintiff. Objection sustained.

The COURT:

Q. Do you know anything about it?
A. No, sir.
Q. State if you know of anything in connection with the construction of the plow, engine, or any portion of your train causing this accident.
A. I do not.
Q. You knew there was no snow-plow ahead of your train?
A. Yes, sir.
Q. Did Mr. Monroe know it?
A. He did.
Q. How long had Monroe been an engineer on the Northern Pacific railroad?
A. I don't know.
Q. As long as you had been conductor?
A. He was there before I came there.

The defendant, to further maintain the issues on his part, introduced as witness PATRICK GOHERTY, who testified as follows:

On January, 1888, I lived at Livingston; headquarters at Billings; was road master for defendant. My duties were to look after the condition of the track and everything pertaining to it; to take charge of wrecks and to make a report to my superior officer of the

cause of the derailment or accident, the condition of the wreck, and so forth, and to take charge of the cars until I got them on the track again, and then to take them to the nearest terminal station and turn them over to the master mechanic. I took charge of this wreck. I was on the train that was wrecked, took charge of it, and afterwards turned it over to the master mechanic at Livingston. I got on the train at Livingston with 18 laborers for the pur-
69 pose, if the train got stalled in the snow, to have them help clear her out. I came up to Livingston on train No. 1 and took train No. 6 back. It was customary for me during storms to send out men during the winter for the purpose of digging out trains that were stalled. I was in the first-class coach at the time, and the first thing I knew of the derailment the coaches were going down the bank.

(Witness makes on paper a pencil sketch showing the position of the track, cars, and engine when he examined the wreck. This he used in explaining and illustrating the following testimony:) The length of the cut where the accident occurred was 180 feet. The east end of the cut is on a level with the track. The ground runs down abruptly from that end until the fill gets between 10 and 12 feet high.

Q. Where was the engine derailed?

A. The engine lay 360 feet from where the cars went off; 360 feet east of where the cars were derailed.

Q. You mean the other cars—the baggage and passenger coaches?

A. Yes, sir.

Q. State where you found the tank and engine left the track.

A. 360 feet from the west end of the cut.

Q. Was it through the cut?

A. Yes, sir; 180 feet through and east of the cut. I will say that the derailment of the baggage car took place at the west end of the cut, and the baggage car and coaches ran on the ties clear through the cut. The engine and tank was not off the track at all until this car crossed the rails and got so then that it pulled her down and threw her off—threw her over after they had passed through the cut. I first looked for the men who were on the engine—the engi-
neer and fireman who were killed—and then went to Gray
70 Cliff, two miles, and reported the wreck to my superintendent. We found Monroe dead under the tank. After we had attended to him as well as we could and put him in the baggage car, I went down to the wreck and examined everything, so that I could make a clear statement to the superintendent of the cause of the accident. The cause of the wreck was from the forward end of the baggage car getting off the track at the west end of the cut, as they were entering the cut, and the balance of the coaches coming through the cut derailed the coach behind, and then when they came through the cut they crossed over onto the other rail and ran directly parallel with the track, and then the baggage car took across the rail and dragged the tank off and slid the rail right from under it. The baggage car and coaches were pulled right clean out until they got at such an angle that they turned the tank and

engine clean over. The rail was out for 180 feet, with no marks on the ties at all; just slid right out, and then they turned her over. The last rail they were running on, that the engine was on, was bent clean out as a matter of fact.

Q. The grade from the east opening of this cut is very abrupt to the point where the engine and tank went off. It is very abrupt, you said?

A. Yes, sir.

Q. You may state generally the distance between the track and the surrounding parts of the wreck.

A. From the track to where the east end of the baggage car was was something about 32 feet.

Q. I do not quite understand.

A. 32 feet from the main track to the east end of the baggage car.

Q. It had run off from the rails?

A. Yes, sir.

Q. And run over the ties?

A. Yes, sir.

Q. Please state the height of the fill beyond the east end
71 of the cut.

A. At the east end?

Q. From the east end to where the engine and tank went over.

A. It must have been ten or twelve feet. It commenced at the east end of the cut.

Q. Is the ground level?

A. Yes, sir.

Q. Then it depresses until it is ten feet below the track?

A. Yes, sir.

Q. Where the engine and tank went off?

A. Yes, sir; so that the Pullman car was level with the track where they stood.

Q. Do I understand you to say that it gradually depresses from the east end of the cut down to where the engine and tank were thrown off? You mean the fill increases in height and not the ground depresses?

A. I don't mean the track. The ground runs gradually down until that fill gets 15 or 16 feet deep still further east.

Q. From the east end of the cut to where the engine and tank went off—state the rate of depression there is in that distance.

A. It must be ten or twelve feet in 180 feet.

Q. In the 180-feet distance?

A. Yes, sir.

Q. Q. Ten or twelve feet depression from the track?

A. Yes, sir; ten or twelve feet depression or fill.

Q. State what you observed in connection with the train with a view of discovering the cause of the accident.

A. Yes, sir; I said I knowed what was the cause of the accident.

Q. Did you examine the engine?

A. Yes, sir; everything was solid there.

Q. Did you discover anything broken?

A. No, sir.

Q. Anything broken in connection with the engine or plow?

A. No, sir; nothing except the smoke-stack.

Q. Nothing except the smoke-stack?

A. No, sir; the smoke-stack was all.

72 Q. State the purposes of snow-plows in storms of this character. What are they used for on railroads?

A. To clean off the snow, to keep the trains from stalling.

Q. On the occasion in question was there any necessity for a snow-plow running in advance of this train?

Objected —, the witness not being shown competent to testify in this respect.

Q. From your 38 years' experience are you competent to state the purpose of snow-plows?

A. I think I am.

Q. Are you able to state whether there was any occasion for sending a snow-plow on the night in question ahead of this train?

A. No, sir; I think our cuts was not filled at all. I think there wasn't any occasion for sending a snow-plow on account of the other one coming.

Q. I didn't hear what you said.

A. On account of the trains running so regular through those cuts I don't believe there was any occasion for a plow going out.

Q. You think there was no occasion for a plow to go out ahead of that train?

A. I don't think there was. There was a very heavy grade going west, and it was easier to stall a train going west than one going east; therefore there was no occasion for a plow to go east.

Q. I didn't understand you to state the cause of this accident. Will you please state the reason for this accident and the cause which led to it?

A. The occasion of the accident was the front truck of the baggage car got off the track at the west end of the cut and derailed the balance of the coaches behind it. They ran on the ties until

73 they came to the east end of the cut, and then they crossed the other rail and ran parallel with the main track. The engine and tank must have been on the track at the time they got here, but they were pulled clean down as soon as they got at a certain angle from the track, as the baggage car, the further it got, got more force to pull the tank over until it got so that it turned her right over.

Q. Were the engine and tank on the track up to that time?

A. Yes, sir; they were.

Q. Up to the time they were pulled off by the other cars?

A. Yes, sir; the indications at the place showed that they were on it.

Q. Who took the plow off the engine when it was brought back? Did you take the plow off the engine?

A. I had the plow taken off under my supervision.

Q. After it was brought back to Livingston?

A. I loaded that on a flat car and took it to Livingston.

Q. State the condition of the braces and fastenings of this plow.

A. I saw no braces broken at all. There was nothing wrong with the plow or with the engine. When the engine turned over there was one of the wings bent in under it.

Q. That was the reason the wing was bent?

A. Yes, sir.

—. Was there anything broken in connection with the fastenings of the plow to the engine?

A. No, sir.

Q. You made an examination yourself?

A. Yes, sir; I made the examination.

Q. Did you examine the bolts and braces? State if the braces which held the plow to the engine were firm.

74 A. As far as the braces were concerned, he had to take the bolts out of the main beam to get the plow off. I couldn't tell you whether the nuts were loose or not.

Q. The bolts that fastened the plow to the engine, how were they?

A. The fastenings of the plow were all right.

Q. Was there anything in connection with the plow out of order or broken to your recollection?

A. Nothing but this wing on that side.

Q. The braces of the bolts?

A. No, sir.

The witness on cross-examination testified as follows:

Q. You say you had this plow taken off under your supervision?

A. Yes, sir.

Q. Who did the manual labor of unscrewing this plow from the engine or from the pilot?

A. My section foreman.

Q. What is his name?

A. Anderson.

Q. He is the one that handled the wrench?

A. Yes, sir; he is the one that handled the wrench.

Q. Where is he?

A. I don't know where he is; he is not on the road.

Q. Did you see him handle the wrench?

A. Yes, sir.

Q. How many bolts attached this plow to the beam? The plow was bolted to the beam?

A. Yes, sir.

Q. Did you hear what Mr. Rossiter said, that there was sometimes four and sometimes six bolts used to attach the plow to the beam? Mr. Lashorn spoke of the pilot being attached to the beam sometimes by 4 and sometimes six bolts, running through the timber of the plow and through the timber of the pilot. You say that you saw this man take these bolts out?

75 A. Yes, sir.

Q. What is his name?
A. Anderson.
Q. Did you at the same time make him take out these braces?
A. He took out the bolts that go through the beam here.
Q. Tell us where on that plan they were. You don't mean the three heel bolts?
A. I didn't do it.
Q. You didn't do it?
A. No, sir.
Q. Did you see him take off these braces?
A. I couldn't tell you anything about that, because such things as that I didn't take any interest in, not in such things.
Q. Then if these braces were all off you simply say you don't know anything to the contrary?
A. If they were broken I could see them.
Q. If you had taken off the braces they are within the plow, are they not?
A. He took off all those braces that go through the main beam; that's all he took off to take the plow off.
Q. I asked you with reference to these braces that are inside the plow. Did you see him take off any of them?
A. We don't have to take them off.
Q. There appears on this plan what Mr. Rossiter spoke of as a plate brace, represented by this dotted line, in the shape of a bracket. Can you describe that that was in?
A. That had to be taken off; the bolts run through the beam.
Q. Did you notice that when you took the plow off, without regard to this general idea?
A. We just took the plow off, and the braces were all sound and they were all there.
Q. As far as you know they were all there?
A. Yes, sir.
Q. Did you notice particularly all the braces?
76 A. I notices there were none of them broken.
Q. Did you notice particularly all the braces?
A. I noticed there were none of them broken.
Q. Did you notice particularly the different braces?
A. No; I did not.
Q. You can't tell me whether there were one or two braces on there?
A. I know there must have been more than one or two, because we don't have the plow fastened with only two braces.
Q. More than one or two heel braces?
A. What do you call heel braces?
Q. Running from the heel of the plow to the beam, indicated by these lines.
A. Those are the angle braces.
Q. No; those are not the angle braces. Those angle braces do not appear on this plan at all.
A. The heel braces go through the main beam.
Q. How many were there of them?

A. I don't know whether there were three or four or five; I don't remember how many.

Q. Then you didn't notice particularly enough to notice whether there were three or four or five?

A. I noticed enough to know——

Q. Then you don't undertake to dispute Mr. Rossiter when he says there were only one heel brace represented by these dotted lines?

A. No, sir; I don't.

Q. You say that the baggage car left the track first?

A. Yes, sir.

Q. You don't mean to be understood that you saw it yourself?

A. No, sir.

Q. You simply judge from the appearances that you saw after looking the ground over?

77 A. The indications showed it.

Q. When you undertake to answer the question of what caused the wreck you are not telling anything that you saw, but you are simply telling what the indications led you to think what caused the wreck?

Witness makes no answer.

Q. What did the train consist of?

A. Engine, tank, baggage car, second-class coach, first-class coach, and then Pullman car.

Q. What car in the train were you in?

A. In the first-class coach.

Q. Sitting in one of the seats?

A. Yes, sir.

Q. Then you were pretty well towards the rear end of the train?

A. There was a Pullman coach behind.

Q. Only the Pullman car behind you?

A. Yes, sir; that's all.

Q. Then when you went forward you found the cars in the condition you have described?

A. Yes, sir.

Q. Can you tell us approximately the weight of that baggage car?

A. No, sir; I cannot.

Q. You can give a good deal better idea of it than we can?

A. I can't tell you about that.

Q. As compared with the engine, can you tell approximately how much heavier the engine was than the baggage car? It was a good many times heavier, was it not?

A. Yes, sir.

Q. You say you didn't find Monroe when you went forward?

A. No; I didn't.

Q. You looked for him?

A. Yes, sir.

Q. It was dark?

A. Yes, sir; it was.

Q. You say you didn't believe there was any need of send-
78 ing a plow ahead of this train?

A. No, sir.

Q. Sometimes plows are sent ahead of trains?

A. Sometimes; yes.

Q. For what purpose?

A. To clean the snow out of the cuts.

Q. To clean the snow, whenever there is snow, whether it is in the cuts or in the level?

A. Yes, sir.

Q. If the snow was two feet deep and the track was cut by a snow-plow and then it fills up again, there would be two feet of snow on the rail, wouldn't there?

A. That would be so; yes, sir.

Q. Then the object of the snow-plow is to clear the snow wherever it is found?

A. Yes, sir.

Q. It had been storming a good while?

A. I don't recollect how long it was storming. It was storming then, I know.

Q. And the wind blowing?

A. Yes, sir; the wind blowing strong.

Q. That is a prairie country?

A. It is a rolling prairie country.

Q. It doesn't take long in that country for the wind to fill a cut wherever it is natural or artificial, does it?

A. No, sir; it would not.

Q. What is the object of sending a snow-plow ahead? Is it to clear the snow off the tracks?

A. Yes, sir.

Q. What is the need of clearing it off?

A. To keep the engine and train from stalling.

Q. That is, running in and then stopping?

A. Yes, sir; and stopping?

Q. If the snow is not plowed off the track, the track gets in
79 bad shape, doesn't it?

A. No; the track doesn't get in bad shape on account of the snow.

Q. Never?

A. Once in awhile it gets so we get a bad flange on it; that's all.

Q. What do you mean by a bad flange?

A. Sometimes it packs down tight and——

—. The snow drifts in and packs down tight?

A. Yes, sir.

Q. And then it has a bad flange?

A. Yes, sir; sometimes it gets what we call a bad flange.

Q. And when you get a bad flange there is more danger of derailing a train, isn't there?

A. Yes, sir.

Q. Then Mr. O'Rourke was not right entirely when he said that

the snow-plows were not to prevent accidents? There is more danger and more chance of accidents in bucking snow than there is on a clear track?

A. Yes, sir.

Q. It is considered a dangerous business butting into a snow-bank, is it not?

A. Yes, sir; certainly it must be.

Q. You think from the position of the engine and the cars that the engine didn't leave the track until after the engine had passed the cut. What makes you think so?

A. The indications of the track and the way the engine was and the way the car lay.

Q. Describe that to us.

A. After the cars got off the track the pressure of the cars on the tank of the engine was pulling it this way, and it took the rail clean out for six lengths of rail, because the cars ran parallel with the main track. Therefore when they got at an angle far enough to turn her they turned her right over, but she held the rail until then.

Q. The cars, you think, left the rail or the track at the
80 west end of the cut and ran off the rails and on the ties for a distance of 180 feet through the cut?

A. Yes, sir.

Q. How many feet long is a rail?

A. 30 feet.

Q. Do you think the engine didn't leave the track or the rail but ran 180 feet before it was pulled over?

A. Yes, sir.

Q. How do you know?

A. Because there was no track on the ties at all. If she was off the track she would have marked the ties. The cars didn't go up this last 180 feet. They were along the embankment.

Q. The baggage car went up this 180 feet *feet?*

A. Yes, sir.

Q. The baggage car remained next the tender?

A. Yes, sir. The baggage car was the first car that left the track.

Q. That is your theory. Perhaps we think you are mistaken. The front end of the baggage car went practically as far as the rear end of the tender, did it?

A. Yes.

Q. According to your theory the baggage car ran 180 feet before it tipped over?

A. It didn't tip over at all.

Q. It didn't tip over at all?

A. No, sir.

Q. Before it pulled the tender over?

A. Before it pulled the tender or the *tender;* all the coaches were coupled together. The whole train was coupled together in this cut.

Q. How do you know that the tender didn't run off the rail just as far as the baggage car did?

A. Because there was no marks on the ties at all this last 180 feet.

Q. That is your reason for believing that the baggage car ran 180 feet off the rail?

A. She ran the first 180 feet through the cut, off the rails,
81 and then crossed down the embankment and went clean down this incline, and the balance of the cars forced her along until they got at such an angle that they turned the tender over, and that turned the engine over.

Q. How was the engine lying when you got there?

A. She was on her side.

Q. How was the baggage car?

A. Right side up.

Q. On her wheels?

A. Yes, sir; on her wheels. The forward trucks were driven partly back under the center of the car.

Q. Does that look as though the tender had gone off the track or as if the tender had gone off the track and the baggage car had butted against it?

A. No. This was done by the car going down the embankment.

Q. The rest of the cars were going alongside the track?

A. Yes, sir; the balance of the train.

Q. Were any of the cars upset?

A. No, sir; nothing but the engine and tender.

Q. Both the engine and the tender lay on their sides?

A. Yes, sir.

Q. On the left-hand side of the track?

A. On the north side of the track, and here the tank lay. The baggage car was here and the tank lay right there—right across between the engine and the baggage car.

Q. Can't you make a picture of the engine and tank and the positions they lay in?

A. Yes, sir. (Witness makes a rough diagram showing position of engine and cars.) The tank lay across here, the end of the tank came across here this way, and the engine was lying right along here (indicating on diagram).

82 Q. You say this embankment was not high. Was it very much sloping up and down? How far was it from where the tank was; how steep was the embankment, how far down?

A. About 10 feet.

Q. About 10 feet?

A. Yes, sir.

Q. You say the reason why you think that the baggage car left the track first was because there were no marks on the ties; is there any other reason?

A. There was no mark on the ties from the end of the cut to where the engine was off the track; that was 180 feet from the end of the cut.

Q. But all through the cut where the cars were derailed there were marks on the ties; is there any other reason?

A. No, sir.

Q. And that is your explanation?

A. The position of the cars and everything indicated what I have explained. No railroad man that would see it would come to any other conclusion; any railroad man that saw it would come to that conclusion right off.

Q. That is your opinion, you know?

A. Yes, sir; that is my conclusion.

The witness on redirect examination testified as follows:

Q. When you say there were no marks on the ties please explain how they were made and at what place.

A. By the trucks of the engine or by the tank or the cars or anything else that would get off the track and make marks. They always show, so that you can see plainly that they were off there. There was no marks at the place where the cars took down the embankment.

Q. You have stated on your cross-examination that you could not remember the number of braces [which attend the plow
83 to the engine.

A. I didn't pay any attention—at least, no particular attention—to the plow, only to see that there were no braces broken.

Q. Were the necessary number of braces to fasten the plow to the engine there?

A. There must have been.

Q. Were there?

A. I can't give the number.

Q. I am not asking you to give their number. I am asking you whether the necessary number of braces to fasten the plow to the engine were there?

A. Yes, sir.

Q. In good order?

A. Yes, sir; in good order and none of them broken.

Defendants rests.

Plaintiff, to further maintain the issues on his part, reintroduce witness W. H. SMITH, who testified as follows:

Q. Can you give us the weight of this engine, No. 161?

A. With coal, water, and all of it I should say it would weigh 70 tons.

Q. Can you give us the approximate weight of the baggage car?

A. I don't know that I can. Those cars must weigh in the neighborhood of 30 tons, possibly; I should think so.

Q. Do you know where this engine, No. 161, was after you brought it in on the night of the eighth?

A. I took the engine to the round-house.

Q. Do you know whether it was taken out again that night?

A. Yes, sir.

Q. Who took it out?

A. A man by the name of Haskins.

Q. How long was it kept out?

84 A. Long enough to make one trip from Livingston and bring it back again to Livingston. He brought it in on the evening of the ninth.

Q. That is the evening of the night that Monroe took it out at midnight?

A. Yes, sir.

The witness on cross-examination testified as follows:

Q. What is the name of the engineer that took that engine out on the eighth?

A. I think the man's name was Edward Haskins.

Q. Is he here?

A. No, sir; I have not seen him.

Q. You examined the engine after he brought it back?

A. No, sir.

Q. You don't know anything about its condition, then, and you know nothing about the condition of the plow?

A. No, sir.

The foregoing was all the evidence adduced at the trial of said case.

Thereupon the court instructs the jury as follows:

"This action is brought to recover damages for a personal injury alleged to have been caused by the negligence of the defendant company, which caused the death of the plaintiff's intestate. The action was originally brought by the administrator of the deceased in Hennepin county district court, in this State, and was removed to this court by the defendant, under the act of Congress providing for such removals.

The death occurred in Montana Territory. Plaintiff's intestate was a locomotive engineer, employed by the defendant com-
85 pany to operate locomotives upon its railroad which it owned in Montana, and the accident by which plaintiff's intestate lost his life happened on the 10th day of January, 1888. The cause of the death is alleged to have been the derailment of the train and engine which he operated as engineer, and it is claimed that the derailment was owing to the negligence of the defendant railroad company.

The general rules governing employés of a railroad, engineers, and others is this: The employé assumes *to* the ordinary and natural risks incident to his employment; but to that rule there are some exceptions to which I will call your attention. The Supreme Court of the United States have adopted the rule laid down by Chief Justice Shaw, of Massachusetts, and I will give it to you as by him laid down: "That he who engages in the employment of another for the performance of specific duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal comtemplation the compensation is adjusted accordingly." That is the general rule. There are certain exceptions to this rule, and I will read

to you one of them, and this arises to a certain extent out of the obligation imposed upon the master—that is, the employer: "The obligation is imposed upon the employer that he will use reasonable care to furnish safe and suitable machinery and appliances to the employee for the discharge of his work." In this case when the plaintiff's intestate*d* entered the service of the defendant company the obligation and duty imposed upon the company was that he would use reasonable care and caution to furnish the engineer, the plaintiff's intestate, with suitable and safe engines in the discharge of his work, and not only the engine, but if he
86 was operating a snow-plow in connection with the engine the defendant was to use the same care in providing the plaintiff's intestate with all the attachments necessary in the operation of the road or in the discharge of his duty. This obligation is a continuing one. The employer must not only, in the first place, use reasonable care to furnish the employee with proper, safe, and suitable engines, but, as this is a continuing obligation, the defendant is required to see that the engine, appliances, and appurtenances are kept in a reasonably safe and suitable condition—that is, it was necessary for the defendant to repair them if they got out of order. Out of this obligation*s* certain exceptions to the general rule arise, and one is this: that an employer will not expose an employee in the conduct of the employer's business to perils and hazards against which he might be guarded by proper diligence on the part of the employer; and it is implied in the same contract that the master or employer shall supply the physical means and agencies for the conduct of the business, and in selecting such means he shall not be wanting in proper care, for, if he is negligent in doing this, that is not a risk or a hazard that is assumed by the employee.

Now, in this case the negligence charged by the plaintiff's intestate is that *that* the defendant company was negligent in not repairing the plow that was attached to the pilot on this engine, and that in that condition, without repair, it was unsafe and not suitable for the engineer in the discharge of his duty; also that the defendant was negligent in not providing a reasonably safe track by clearing the same of snow, so that the engineer could operate the train with safety and security to himself as well as to
87 the passenger. That is the negligence charged upon the defendant.

The burden of proof is upon the plaintiff by the weight of evidence to satisfy the jury that the defendant was negligent before he can recover under any circumstances. So that the first thing for you to consider upon retiring will be, was the defendant negligent, as charged by the plaintiff in this action? Did it fail to discharge any duty which the law imposed upon it for the safety of its employee, the plaintiff's intestate? If it did, and if such negligence was the cause of the death of the engineer, Munro, then the plaintiff is entitled to recover. I might say here that the contract between the defendant and the plaintiff's intestate must be governed by the laws of the Territory of Montana. The death occurred in Montana,

while the engineer was in the employ of the defendant company, and any injury or death occurring while that relation between the parties existed must be governed by the laws of that Territory, although the suit is brought in the State of Minnesota.

In this action plaintiff seeks to recover such compensation as a jury may deem sufficient damages for a death. As I stated before, if there is no negligence proved by the weight of evidence to your satisfaction, then the defendant is entitled to a verdict, and that is an end of the case, for negligence on the part of the defendant is the gist of this action, and the burden of proof is thrown upon the plaintiff in that respect, and he must prove it or fail in the first instance. If you should determine that the defendant has been negligent, as charged by the plaintiff, still the plaintiff is not entitled to recover if the defence set up by the defendant have been proved. The defendant does not insure absolutely the safety of its employees. All the obligation is that it exercises due and rea-
88 sonable care for their safety; that it will, in this case deceased being an engineer, exercise reasonable care and caution to provide a proper, suitable, and safe engine for his use in the discharge of his duty. That is the duty imposed upon the defendant.

The defendant, in the first place, denies the negligence charged that raises the issue. It also sets up contributory negligence, claiming that the plaintiff's intestate by his own negligence caused the death. This is a defence, and the burden of proof is thrown upon the defendant by the weight of evidence to establish it to the satisfaction of the jury. It is not necessary for the plaintiff, in making out his *prima facie* case, to show that he was free from fault before he can recover if he proves negligence on the part of the defendant; but when contributory negligence is set up on the part of the defendant — fails to establish that contributory negligence, then the plaintiff is entitled to recover if negligence on the part of the defendant is established to the satisfaction of the jury; but all of the evidence in the case is to be considered by the jury where such defence is set up, and it must satisfy them that the plaintiff was free from fault.

Here the defence alleged in order to defeat a recovery in this case are *there* (3): that there was no negligence on the part of the defendant; that the charge that this plow attached to the engine was insecure and unsafe is not true; that the plow had been put in proper repair after the deceased had informed the proper person connected with the company of its condition, and that when the engine was taken out by deceased on the morning of January 10, 1888, it was in a safe, proper, and suitable condition. The defendant has introduced some evidence tending to establish that fact. It has introduced the testimony of the master mechanic, who stated that he employed a boiler-maker or some man connected with the shops at Livingston to see that the rods or braces were all
89 right, and that the plow was safely and securely attached to the pilot of the engine. This, he says, was several days before and after he had been informed by Munro that the plough was

insecurely and unsafely attached to the pilot. On the contrary, there is the evidence of Smith tending to show that up to the night of the 8th of January, two days before the death of plaintiff's intestate, the engine in question was in the condition that it was on January 6th, when he also had called the attention of the master mechanic and other persons to the insecure condition of the plow. It is for you to determine from the evidence whether, as far as that branch of the case is concerned, the plaintiff has made out his case by a preponderance of the evidence, or whether the defendant is entitled to a verdict, the burden of proof, as *was* as that branch of the case is concerned, being upon the plaintiff, and if he has not shown to your satisfaction that the railroad company was negligent in that respect he is not entitled to recover, but you must return a verdict for the defendant.

It is claimed and urged that even if you should determine that this plow was insecure and unsuitable and that the defendant was negligent, still that the plaintiff's intestate knowing that fact, that the plow was in the condition, the rods being loose and some of them broken, as described by the witnesses; that as the deceased continued to use and operate the same with full knowledge of the defects existing—that that was contributory negligence on his part. In other words, that when he did so and continued to use it, knowing the condition in which it was, that he assumed the extraordinary risks of the condition that the plow was in—in being out of repair—and therefore he cannot recover.

The law with respect to that branch of the case is this: that unless this defect was so glaring that none but a reckless person would use the plow in the condition in which it was the plaintiff would be entitled to recover. In other words, that although he might
90 know of the defects, and even might know that there was some risk attending the use of that plow, still if he thought that by the exercise of care equal to the occasion he could use the engine with safety he cannot be said to have been guilty of contributory negligence. So that resolves itself down to this point: Was he guilty of contributory negligence when he used that engine in the condition in which it has been described by the witnesses?

The question of contributory negligence is one for the jury to determine from all the facts in the case. If this engine was in such repair that no prudent person in the exercise of ordinary care would assume the risk, then the plaintiff cannot recover; but if the condition of the engine was not so apparently, so glaringly dangerous that none but a reckless person would use it, then the deceased would not be guilty of contributory negligence in using it.

The charge in this complaint is that this death was caused by the derailment of the engine, which took place because the plow was out of repair as described, or at least that the defendant had not used reasonable care in clearing its tracks, and that when the engineer with the engine in that condition arrived at this cut, two miles from Grey Cliffe, the snow had accumulated to such an extent that the engine was thereby derailed, and that it was this negligence on the part of the defendant that caused the death. It is for you to

determine from all the facts in the case whether this is true or not and, if so, whether the defendant has established the defenses that have been set up in this case.

If you believe from all the evidence in the case that the plaintiff is entitled to recover, then it is for you to determine what compensation you will give for the death of the plaintiff's intestate.

91 The law of Montana limits it to such an amount as you think would be proper under all the circumstances of the case, and that is the law which will govern you in this case. Many States have different laws. The law in this State until recently was that only $5,000 could be given in case of a death. It has lately been increased to ten thousand dollars. Some States give more, some give less. There is no uniform rule with regard to it. The whole matter is left by the law of the Territory of Montana to the sound judgment and discretion of the jury.

I am requested to give you certain instructions by the defendant. (The first request asked by defendant is as follows: You, the jury, are instructed to find a verdict for the defendant; which said request was refused by the court.)

The second I do not think is pertinent to the case, and I decline to give it.

(Said request asked by defendant is as follows:)

The court instructs the jury that the laws of Minnesota limit the amount of damages to be recovered in this case to $5,000; which said request was refused by the court.

(The third request asked by defendant is as follows:)

The court instructs the jury that unless they find that it was customary for defendant company to send a snow-plow in advance of the trains running east from Livingston during storms of this character, and that unless, further, the accident occurred by reason of the negligent and careless failure of the defendant to send such snow-plow in advance, they will find for defendant.

Which said instruction was not given by the court as asked by the defendant; but the court, with respect to said request No. 3, charged the jury as follows:

92 The court instructs you that unless the accident occurred by reason of the negligent and careless failure of the defendant to send a snow-plow in advance they will find for defendant. It is claimed here that a snow-plow should have been sent in advance of this train which would have cleared the track, and that the failure to send a snow-plow in that manner was negligence on the part of the company.

The fourth request asked by defendant is as follows:

The court instructs the jury that unless they find that the defendant negligently and carelessly furnished to the deceased engineer a plow attached to his engine, the iron bolts and rods of which were broken, imperfect, and insufficient, and that by reason of which condition the said plow was loose and insufficiently secured to the pilot of said engine, and that when the said engine struck the snow at the cut, as testified to, the pilot plow of said engine, by reason of its said broken, loose, and imperfect condition, did ride

upon the accumulation of snow and ice at said cut, and that thereby the said engine was thrown from the track, the jury will find for the defendant.

Which said instructions No. 4 the court gave as follows:

The court instructs you that unless you find that the defendant negligently and carelessly furnished to the deceased engineer a plow attached to his engine, the iron bolts and rods of which were broken, imperfect, and insufficient, and by reason of said imperfect condition, when the engine struck the snow at the cut, as testified to, the engine and tender were derailed by reason thereof, which caused the accident in question, then the defendant would be entitled to a verdict.

The claim is that the snow had accumulated to such an extent in that cut that when the engine struck it, the plow being in
93 that condition in which it was, it was unable to clear the track, the accumulation of snow being so great, and that, as described by some witnesses, it rode up and threw the engine off the track from the fact that the front trucks of the engine could not ride over it. I instruct you that unless the cause of this derailment and the throwing over of the engine was the imperfect condition of this plow, that it could not clear the cut from the snow which had accumulated there, but the engine was thrown over and thereby death caused—unless this is found to be true to the satisfaction of the jury, the defendant would be entitled to a verdict.

I am also requested by plaintiff's counsel to charge you as follows, which I do:

I. If the pilot plow in question was out of repair or unsuitable it was the duty of the defendant to repair it or make it suitable. After the engineer who was killed reported the defects and after there had been sufficient time and opportunity for the company to remedy them he might properly presume that they had done so.

Whis said request was given by the court with the addition of the "and the evidence is that he reported them some time between Christmas and New Year's," after the words "reported the defects," in said request No. 1.

The COURT: I give you that in view of the fact that the deceased was taken sick and reported himself for duty, I think, on the 9th of January—on the day before he took this train out—and that he was sent for by the proper man in charge at Livingston to come to work and take this train out, he having informed the company previously of the condition in which that pilot and plow were,
94 then, after sufficient time and opportunity for the company to remedy it, he might presume when he went there that it had done so.

Counsel for defendant has referred to and offered in evidence certain orders. No very particular stress has been laid upon these orders and regulations, which were prescribed by the company for the government, conduct, and safety of its employees, as well as for the preservation of its own property. If you find a violation of any of these rules was the proximate cause of the injury, then of course there can be no recovery, because that would be contributory

negligence; but, in the first place, the company must prove that knowledge was brought to the engineer of the existence of such rule, or that he was informed of facts sufficient to put him upon enquiry as to their existance. The only evidence with regard to these rules is the testimony of Mr. Rossiter that after some accident had occurred a certain number of books of rules were sent to him to be given to the engineers and other persons about that place for their guidance and information. He does not recollect distinctly giving a copy of these order/ to the plaintiff's intestate, and before Munro could be charged with a knowledge of these rules the evidence must show you that Rossiter or somebody in authority there informed him of the rules, or that he had information sufficient to put him upon enquiry to ascertain what these rules were, and, still further, that the violation of the rules was the proximate cause of the injury, for even if he had information of the rules, and disobedience of these rules was not the proximate or direct cause of the injury, it would not be contributory negligence to disobey them.

In a case of disobedience the company might say, We will
95 discharge you; we will declare the contract at an end; but unless this disobedience was the direct cause of the injury the plaintiff's intestate cannot be held guilty of contributory negligence even if knowledge of these rules were brought home to him. As to this evidence, it is for you to determine what weight you will give to it. You are to take into consideration all the evidence on both sides, and all the circumstances which have been described to you with regard to the manner in which this death resulted, and say whether the plaintiff or the defendant is entitled to a verdict.

If you should come to the conclusion that the defendant is entitled to a verdict, you will say so. If you should come to the conclusion that the plaintiff is entitled to a verdict, then you will arrive at the amount of compensation you may think proper and just, not taking into consideration anything for vindictive damages, though they are claimed here, because there is no evidence that there was any wilfulness on the part of the defendant company, even should you find that there was negligence.

The defendant excepts to that portion of the charge in which the court remarks as to the condition of the plow at the time of the accident.

The COURT: That I will leave to the jury. The jury understand the condition in which the plow was. In order that there may be no doubt about it, the evidence is that Mr. Smith, who was an engineer on that road, stated that on the 6th of January he informed Mr. Rossiter, the proper person there, of the condition in which that plow was, and he said after that when he made his trip and returned that the plow was in the same condition as it was when he
reported it on the 6th. Mr. Rossiter says that several days
96 before Munroe took it out and before the death of plaintiff's intestate he had employed a boiler-maker to put the plow in proper repair and condition. There is other evidence as to the condition of that plow—the evidence of those who examined it after the accident. In my charge I simply called the attention of

the jury to what occurred before the accident, as testified to by Smith and Rossiter.

Before the jury retired the defendant duly excepted to giving the following portion of said charge; which exception was then and there allowed by the court:

"Did it fail to discharge any duth which the law imposed upon it for the safety of its employee, the plaintiff's intestate? If it did, and if such negligence was the cause of the death of the engineer, Munro, then the plaintiff is entitled to recover."

Before the jury retired the defendant duly excepted to the following portion of said charge; which exception was then and there allowed:

"The charge in this complaint is that this death was caused by the derailment of the engine, which took place because the plow was out of repair as described, or at least that the defendant had not used reasonable care in clearing its track, and that when the engineer with the engine in that condition arrived at this cut, two miles from Grey Cliffe, the snow had accumulated to such an extent that the engine was thereby derailed, and that it was this negligence that caused the death."

Before the jury retired the defendant duly excepted to the following portion of said charge; which exception was then and there allowed:

97 "Many States have different laws. The law in this State until recently was that only $5,000 could be given in a case of death. It has recently been increased to $10,000."

Before the jury retired the defendant duly excepted to the following portion of said charge; which exception was then and there allowed:

"If you believe from all the evidence in the case that the plaintiff is entitled to recover, then it is for you to determine what compensation you will give for the death of the plaintiff's intestate. The law of Montana limits it to such an amount as you think would be proper under all the circumstances of the case, and that is the law which will govern in this case."

Thereupon, and before the jury retired, the defendant requested the court to charge the jury as follows:

"You, the jury, are instructed to find a verdict for the defendant."

Which charge the court refused to give; to which refusal the defendant then and there, before the jury retired, duly excepted, and said exception was then and there allowed by the court.

For a second request defendant requested the court to instruct the jury that the laws of Minnesota limit the amount of damages to be recovered in this case to five thousand dollars; which request the court refused to give; to which refusal the defendant then and there and before the jury retired duly excepted, and said exception was allowed by the court.

The defendant thereupon requested the court to instruct the jury as follows:

98 Which charge the court refused to give; to which refusal the defendant then and there, before the jury retired, duly

excepted, and said exception was then and there allowed by the court.

For a second request defendant requested the court to instruct the jury "that the laws of Minnesota limit the amount of damages to be recovered in this case to five thousand dollars."

Which request the court refused to give; to which refusal the defendant then and there, before the jury retired, duly excepted, and said exception was then and there allowed by the court.

The defendant thereupon requested the court to instruct the jury as follows:

III.

"The court instructs the jury *the* unless they find that it was customary for defendant to send a snow-plow in advance of the trains running east from Livingston during storms of this character, and that unless, further, the accident occurred by reason of the negligent and careless failure of the defendant to send such snow-plow in advance, they will find for defendant."

Which request the court refused to give; to which refusal the defendant then and there, before the jury retired, duly excepted, and the court in place thereof gave the following instructions; to the giving of which instructions the defendant then and there, before the jury retired, duly excepted, and said exception was allowed by the court:

"The court instructs you that unless the accident occurred by reason of the negligent and careless failure of the defendant to send a snow-plow in advance they will find for the defendant. It is claimed here that a snow-plow should have been sent in ad-
99 vance of this train, which would have cleared the track, and that the failure to send the snow-plow in that manner was negligence on the part of the company."

The defendant thereupon requested the court to instruct the jury as follows:

IV.

"The court instructs the jury that unless they find that the defendant carelessly and negligently furnished to the deceased engineer a plow attached to his engine, the iron bolts and rods of which were broken, imperfect, and insufficient, and that by reason of which condition the said plow was loose and insufficiently secured to the pilot of said engine, and that when the said engine struck the snow at the cut, as testified to, the pilot plow of said engine, by reason of its said broken, loose, and imperfect condition, did ride upon the accumulation of snow and ice at said cut, and that thereby the said engine was thrown from the track, the jury will find for the defendant."

Which request the court refused to give; to which refusal the defendant then and there, before the jury retired, duly excepted, and in place thereof the court gave the following instructions; to the giving of which instructions the defendant then and there, before the jury retired, excepted; which exceptions was allowed by the court:

"The court instructs you that unless you find that the defendant negligently and carelessly furnished to the deceased engineer a plow attached to his engine, the iron bolts and rods of which were broken, imperfect, and insufficient, and by reason of said imperfect condition, when the engine struck the snow at the cut, as testified to, the engine and tender were derailed by reason thereof, which
100 caused the accident in question, then the defendant would be entitled to a verdict. The claim is that the snow had accumulated to such an extent in that cut when the engine struck it, the plow being in the condition in which it was, it was unable to clear the track, the accumulation of snow being so great *and* that, as described by some witnesses, it rode up and threw the engine off the track from the fact that the front trucks of the engine could not ride over it. I instruct you that unless the cause of this derailment and the throwing over of the engine was the imperfect condition of the plow; that it could not clear the cut from the snow which had accumulated there, but the engine was thrown over and thereby the death caused—unless this is found to be true to the satisfaction of the jury the defendant would be entitled to a verdict."

The jury then retired and rendered a verdict for and in behalf of the plaintiff and against the defendant for the sum of ten thousand dollars.

Plaintiff seasonably objected to the settling and to the allowing of a case or bill of exceptions in this action, for the reason that the time has passed and defendant has waived and lost the right to have any such.

This bill of exceptions is now settled and allowed at defendant's request and against the protest of plaintiff.

And for the reason that the foregoing matters and things do not appear of record in said action the judges who tried said cause, finding the same to be true and correct, has signed and sealed this bill of exceptions this 28th day of April, 1890, and ordered the same to be made a part of the record of said action.

R. R. NELSON, *Judge.*

101 To Messrs. Benton & Healy, attorneys for plaintiff, Minneapolis, Minn.

DEAR SIRS: Please take notice that the foregoing is the engrossed bill of exceptions in the action herein entitled.

JOHN C. BULLITT, JR.,
WM. H. BLISS,
Attorneys for Defendant.

(Endorsed:) Files April 28th, 1890. Oscar B. Hillis, clerk.

102 And afterwards, on the 30th day of April, A. D. 1890, came the above-named defendant, by its attorneys, and filed in the office of the clerk of said court the following præcipe for a writ of error, in the words as follows, to wit:

103 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

United States Circuit Court, District of Minnesota.

ALBERT L. BABCOCK, Adm'r, &c., }
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY. }

To Oscar B. Hillis, clerk of the court:

You will please issue a writ of error to the Supreme Court of the United States in the above-entitled cause.

JOHN C. BULLITT, JR.,
WM. H. BLISS,
Attorney for Defendant.

(Endorsed:) Filed April 30th, 1890 Oscar B. Hillis, clerk.

104 And afterwards, on the 1st day of May, A. D. 1890, came the above-named defendant, by its attorneys, and filed in the office of the clerk of said court *their* assignment of errors in the words and figures as follows, to wit:

105 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

United States Circuit Court, District of Minnesota.

ALBERT L. BABCOCK, Adm'r, &c., }
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY. }

Assignment of Errors.

And now comes the defendant, by John C. Bullitt, Jr., and William H. Bliss, its attorneys, and says that in the record and proceedings in said court in the above-entitled cause, and also in giving judgment therein, there is manifest error in this, to wit:

First. The court erred in charging the jury as follows:

"Did it fail to discharge any duty which the law imposed upon it for the safety of its employee, the plaintiff's intestate? If it did, and if such negligence was the cause of the death of the engineer, Munro, then the plaintiff is entitled to recover." To the giving of which charge defendant's counsel duly excepted.

Second. The court erred further in charging the jury as follows:

"The charge in this complaint is that this death was caused by the derailment of the engine, which took place because the plow was out of repair as described, or, at least, that the defendant had not used reasonable care in clearing its track, and that when the engineer in that condition arrived at this cut two miles from Gray Cliffe the snow had accumulated to such an extent that the engine was thereby derailed, and that is was this negligence which
106 caused the death." To the giving of which said charge defendant's counsel duly excepted.

Third. The court erred further in charging the jury as follows:

"Many States have different laws. The law in this State until recently was that only $5,000 could be given in a case of death. It has lately been increased to $10,000." To the giving of which said charge defendant's counsel duly excepted.

Fourth. The court erred further in charging the jury as follows:

"If you believe from all the evidence in the case that the plaintiff is entitled to recover, then it is for you to determine what compensation you will give for the death of the plaintiff's intestate. The law of Montana limits it to such an amount as you think it would be proper under all circumstances of the case, and that is the law which will govern in this case." To the giving of which said charge defendant's counsel duly excepted.

Fifth. The court erred further in refusing to give to the jury the following request tendered by defendant's counsel:

"You, the jury, are instructed to find a verdict for the defendant;" which refusal so to charge was duly excepted to by defendant's counsel.

Sixth. The court erred further in refusing to give to the jury the following request tendered by defendant's counsel:

"The laws of Minnesota limit the amount of damages to be recovered in this case to five thousand dollars;" which refusal so to charge was duly excepted to by defendant's counsel.

Seventh. The court erred further in refusing to give to the jury the following request tendered by defendant's counsel:

107 III.

"The court instructs the jury that unless they find that it was customary for defendant company to send a snow-plow in advance of the trains running east from Livingston during storms of this character, and that unless, further, the accident occurred by reason of the negligent and careless failure of the defendant to send such snow-plow in advance, they will find for the defendant;" which refusal so to charge was duly excepted to by defendant's counsel.

Eighth. The court erred further in refusing to give to the jury the following request tendered by defendant's counsel:

IV.

"The court instructs the jury that unless they find that the defendant carelessly and negligently furnished to the deceased engineer a plough attached to his engine, the iron bolts and rods of which were broken, imperfect, and insufficient, and that by reason of which condition the said plough was loose and insufficiently secure to the pilot of said engine, and that when the said engine struck the snow at the cut, as testified to, the pilot plow of said engine, by reason of its said broken, loose, and imperfect condition, did ride upon the accumulated snow and ice at said cut, and that thereby the said engine was thrown from the track, the jury will find for the defendant;" which refusal so to charge was duly excepted to by defendant's counsel.

And the said defendant prays that the judgment aforesaid rendered against it in this action, for the errors aforesaid and for other and manifest errors in the said record and proceedings aforesaid, may be reversed, cancelled, and altogether held for nothing, and that it may be restored to all things which it has lost by occasion of said judgment.

JOHN C. BULLITT, JR.,
WM. H. BLISS,
Attorneys for Defendant.

Endorsed: Filed May 1st, 1890. Oscar B. Hillis, clerk,

108 And on the same day the following bond was filed in the office of the clerk of said court in the words and figures as follows, to wit:

109 Know all men by these presents that we, The Northern Pacific Railroad Company, a corporation under the laws of the United States, by W. S. Mellen, its general manager, F. A. Seymour and Theodore Borup, as sureties, are held and firmly bound unto Albert L. Babcock, administrator of the estate of Hugh Munro, deceased, or his successor, in the sum of fifteen thousand dollars; to the payment of which, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of April, A. D. 1890.

Whereas lately, at a general term of the circuit court of the United States for the district of Minnesota, begun and holden at the city of St. Paul, in said district, on the third Monday in June, A. D. 1889, and upon the fifth day of July, A. D. 1889, in said term, in a suit depending in the said circuit court between the aforesaid plaintiff and The Northern Pacific Railroad Company, defendant, judgment was rendered against the said defendant for the sum of $10,070.92 *dollars*, and the said Northern Pacific Railroad Company, as such defendant as aforesaid, having obtained a writ of error and filed a copy thereof in the office of the clerk of said circuit court, and a citation directed to said Albert L. Babcock, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Northern Pacific Railroad Company shall prosecute
110 said writ of error to effect and answer all damages and costs of it shall fail to make its plea good, then this obligation to be void; otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILROAD CO.,
By WM. S. MELLEN, *General Manager.*
FRANK A. SEYMOUR.
THEODORE BORUP.

Sealed and delivered in presence of—
EDWARD W. JOHNSON.
TILDEN R. SELMES.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Be it known that on this 30th day of April, A. D. 1890, personally came F. A. Seymour & Theodore Borup, the sureties named in the foregoing bond, and, being duly sworn, each for himself did depose and say that he is a resident of and a freeholder within the State of Minnesota and is worth the sum of fifteen thousand dollars ($15,000.00) over and above all debts and liabilities and exclusive of property exempt from execution.

FRANK A. SEYMOUR.
THEODORE BORUP.

Subscribed and sworn to before me this 30th day of April, A. D. 1890.

[NOTARIAL SEAL.] TILDEN R. SELMES,
Notary Public, Ramsey County, Minn.

(Endorsed:) Filed May 1st, 1890. Oscar B. Hillis, clerk. I approve the within bond. R. R. Nelson, judge.

111 Thereupon, on the 3rd day of May, A. D. 1890, the following citation was issued in the words as follows, to wit:

112 UNITED STATES OF AMERICA, ss:

To Albert L. Babcock, administrator of the estate of Hugh M. Munro, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, wherein The Northern Pacific Railroad Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of April, 1890.

R. R. NELSON, *Judge.*

113 [Endorsed:] Ent. D., law, —6. United States circuit court, district of Minnesota. Albert L. Babcock, administrator, *vs.* Northern Pacific Railroad Company. Citation on writ of error. Service of the within by copy acknowledged this 2d day of May. Benton & Healy, attorneys for plaintiff, Minneapolis, Minn; John C. Bullitt, Jr., Wm. H. Bliss, defendant's attorneys, St. Paul, Minn. Filed May 3rd, 1890. Oscar B. Hillis, clerk.

114 UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Third Division.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of one hundred & twelve pages, numbered consecutively from one to 112, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause and of the whole thereof as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 30th day of September, A. D. 1890.

OSCAR B. HILLIS, *Clerk*,
By —— ——, *Deputy*.

[Endorsed:] United States circuit court, district of Minnesota, third division. —— —— *vs.* —— ——. Return to Supreme Court.

Endorsed on cover: Case No. 14,378. Minnesota C. C. U. S. No. 328. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Albert L. Babcock, as administrator of the estate of Hugh M. Munro, deceased. Filed October 24, 1890.

FILED.
MAR 20 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE NORTHERN PACIFIC, &c., Plaintiff in Error,
vs.
BABCOCK, as Administrator.
No. 328.

In Error to the Circuit Court of the United States for the District of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

This suit was begun in a State court and removed afterwards to the United States Circuit Court, where it was tried and resulted in verdict and judgment for Babcock for $10,000. Exceptions were properly saved, and the case brought here on writ of error.

It is a case of *negligence* and *contributory negligence*, and very similar indeed to the one just preceding it on the docket, *No. 327, Booth's case*, and we ask the court to take our brief in that case and consider it upon the general questions involved, as if filed in this case.

The difference in the two cases will appear as this brief progresses.

The action is by the administrator of Hugh Munro for damages on account of an accident which resulted in the death of Munro. The charge of negligence against the company in the complaint is as follows (Rec., 3–5):

"And the said defendant directed and ordered the said Hugh M. Munro to run a certain locomotive engine, the property of said defendant, known as engine No. 161, over and upon its said railway in said Territory. That prior to and at the time the said orders were so presented to said Munro there had been and then was a severe snow storm in progress, and defendant's line of railway over and upon which said Munro was so ordered to run said engine was covered with drifting snow theretofore accumulated thereon, and then fast accumulating, notwi hstanding which the said defendant corporation did wilfully, improperly, negligently, and carelessly refuse and neglect to send a snow plow ahead of said engine No. 161 to clear the snow and ice from said defendant's said track, which had accumulated and was accumulating thereon by reason of said storm, so as to render the passage of said engine No. 161 safe and proper.

"That there was attached to the forward part of said engine, No. 161, a certain attachment known as a pilot-plow, an appliance constructed thereon for the purpose of clearing the railway of snow and ice accumulated hereon, and render safe the passage of the engine to which said plow was attached, over and upon said railway of defendant.

"That on the said 10th day of January, 1888, the said defendant corporation knowingly, wilfully, negligently, and carelessly allowed to be and remain upon said engine No. 161, attached thereto as aforesaid, a certain pilot-plow, the iron braces, bolts, and rods of which were broken, imperfect, and insufficient, by reason of which condition the said plow was loose and insufficiently secured to the pilot of said engine, allowing the said pilot to raise up and ride over, obstructing snow and ice instead of cutting through the same, as was the intention of its construction, rendering the running of said engine upon said railway dangerous, and that the said defendant well knew of the broken, defective, imperfect, and dangerous condition of said engine No. 161 at the time the

said Hugh Munro was so ordered to run the same upon and over said railway; notwithstanding which the said defendant corporation did negligently and carelessly furnish to said Hugh Munro said engine with the said broken and imperfect pilot-plow attached thereto to run over and upon its said line of railway.

"That while said Hugh M. Munro was running said engine, in the performance of his duty as such engineer, and pursuant to the orders of said defendant corporation, and before daylight on said 10th day of January, 1888, near Grey Cliff, in said Territory of Montana, the said engine struck an accumulation of snow and ice, which said defendant had carelessly and negligently allowed to accumulate upon its said railway track, and the pilot-plow of said engine, by reason of its broken, loose, and imperfect condition aforesaid, did ride upon said accumulation of snow and ice, thereby derailing said engine, and throwing the same from said railway track, whereby the said Hugh M. Munro was instantly killed."

It appears from this complaint that only one charge is made against the road, to wit: "That the pilot-plow of said engine by reason of its broken, loose, and imperfect condition aforesaid, did ride upon said accumulation of snow and ice, thereby derailing the said engine and throwing the same from said railway." There is no general charge of negligence. There is a charge that the company negligently and carelessly allowed the snow and ice to accumulate upon its track; but the only way in which that charge is connected with the accident is by reason of the defective pilot-plow, so that upon an analysis of the complaint, the negligence charged is the defect in the pilot-plow, and that alone.

Munro was an engineer on the Northern Pacific Railroad, running between Livingston and Billings, Montana, and had been so employed by the defendant on the same run since 1883, and had the reputation of being a good engineer, and conversant with his business.

Munro laid off from duty from about January 1, 1888,

until January 9, 1888, and on the last-mentioned day he reported for duty at about noon. At about 12 o'clock midnight he was sent for, to take train No. 6 going east from Livingston to Billings. It is in evidence that it was a very stormy night, and had been snowing from about January 1st, there being at the time of the accident from fourteen to twenty-four inches of snow on the level.

There is evidence tending to show that the pilot-plow on engine No. 161, which Munro took out on the morning of January 10, 1888, was reported out of order by him before he was sick; there is evidence tending to show that it had been repaired, but there is also evidence tending to show that it was out of order on January 8, 1888, and some evidence tending to show that it had not been repaired prior to the time of the accident; but defendant's evidence shows that after the accident the pilot-plow was in good order except the bending in of one of the wings, caused by the accident, but that it had none of the defects stated by the plaintiff's witnesses to have existed on January 8th.

It is in evidence that, just before starting, Munro backed his engine up, and that it stuck in the snow in front of the station at Livingston, and had to be shoveled out. The train left Livingston at 2 o'clock 55 minutes A. M., January 10th, with orders to meet a snow plow at Elton, 12 miles east of Livingston. A light engine had gone east about four hours before this train, but there was no snow plow ahead of the train. The train reached the point of the accident, two miles west of Grey Cliff, about two hours after the snow plow coming west had passed there. (Rec., 25 *et seq.*)

There was some evidence on part of plaintiff tending to show that it would have been prudent for defendant to have sent a snow plow five or ten minutes ahead of this train, not on account of the cut where the accident occurred, but deeper cuts through which the train passed

before the accident; but it is the uncontradicted evidence that Munro had full knowledge of the kind of storm which was and had been raging, and also knew that no snow plow had been sent ahead of this train, and that he had as good opportunities for knowing the condition of the track as the defendant, and was familiar with the line of road, the track, and the effect of such a storm upon its condition. (Rec., 18 *et seq.*)

Defendant's evidence tended to show that it was neither customary nor necessary to send a snow plow ahead of the train in such a storm. The plaintiff's witness, W. H. Smith, who testified to the fact that it was prudent to send a snow plow out in such weather, testified as an expert from his experience as an engineer, such experience as Munro had had. (Rec., 19 *et seq.*)

The accident occurred in a small cut where the snow had drifted in about two and a half feet deep; but it is the testimony of both plaintiff's and defendant's witnesses that this was not a bad cut, that the train had passed through the deepest and hardest cuts before meeting this one, and that there was no necessi y for a snow plow preceding the train on account of it.

The plaintiff introduces evidence tending to show that the accident might have occurred in the way stated in the complaint, and that it might have been caused by the defective pilot-plow; but there was evidence for defendant tending to show that the accident was not caused by a defective pilot-plow, but that the baggage car left the track first.

Upon the pleadings and the evidence, the court instructed the jury in effect that it could find for plaintiff if the accident was caused either by the failure of defend. ant to send a snow plow in advance of the train, or if it was caused by the pilot-plow being defective as alleged. (Rec., 50 *et seq.*)

The complaint in this case is, in some respects, pe-

culiar, in that it charges defendant with several acts of negligence, but alleges that the accident was caused not by either independently of the other, but by the several acts of negligence combined.

The plaintiff charges, first—

"That defendant wilfully, improperly, negligently, and carelessly did refuse and neglect to send a snow plow ahead of engine No. 161 (Munro's engine) to clear the snow and ice from said defendant's track, which had accumulated and was accumulating by reason of said storm, so as to render the passage of said engine No. 161 safe and proper." (Comp., Rec., 8 and 9.)

Again, after stating that a "pilot-plow" was attached to engine No. 161 for cleaning snow and ice from the track (Comp., Rec., 3–5), plaintiff proceeds to allege the defective condition of said pilot-plow. (See Comp., Rec., 3–5.) After alleging these acts of negligence the plaintiff proceeds to connect them with the accident, and make them the ground of his cause of action, as follows:

"That while said Hugh Munro was running said engine, in the performance of his duty as such engineer, and pursuant to the orders of said defendant corporation, and before daylight on said 10th day of January, 1888, near Grey Cliff, in said Territory of Montana, the said engine struck an accumulation of snow and ice, which said defendant had carelessly and negligently allowed to accumulate upon its said railway track, *and the pilot-plow of said engine, by reason of its broken, loose, and imperfect condition aforesaid*, did ride upon said accumulation of snow and ice, thereby derailing said engine and throwing the same from said railway track, whereby the said Hugh Munro was instantly killed."

Under the foregoing allegations of negligence it is the contention of the defendant that the plaintiff could not have recovered upon the point that the accident was occasioned by the negligent failure of the defendant to keep the track clear.

It is a general rule of pleading in cases of this character that allegations of negligence, where the action is brought by an employé, must be more specific than when a passenger is plaintiff, and though a general charge of negligence might be sufficient where the passenger is plaintiff, negligence can not be proven under it when an employé is plaintiff.

Clark *v.* C. B. and Q. R. R. Co., 15 Fed., 588.

In Waldin *v.* Hannibal and St. Joe R. R. Co., 2 Am. and Eng. Ry. Cases, 146, the charge of negligence was as follows:

"The defendant, by reason of this negligence and carelessness, plaintiff was run against by one of defendant's cars, thereby throwing plaintiff upon rail of the track of defendant; the said car then and there ran upon and on plaintiff by reason of the negligence and carelessness of the defendant. The plaintiff was then and there by reason of the negligence of the defendant in having and using insufficient and defective machinery, and the carelessness and negligence of defendant in running and managing its railroad and cars, the plaintiff was broken and mutilated as to both of his legs," &c.

The court, in commenting upon this allegation, says:

"A petition by an employé, stating without any specific facts that the plaintiff was injured in consequence of the negligence of a railroad company in using defective machinery, and in running and managing its railroad and cars would be fatally defective, and when such allegations are used in connection with a specific statement of a cause of action, they do not enable the plaintiff to recover for any cause except that specifically stated."

In this case the plaintiff's evidence tended to prove that there was a broken frog at the place where plaintiff was thrown, which caused the accident, and the trial court instructing the jury that it might find for plaintiff on account of the broken frog, the Supreme Court set aside the verdict found for the plaintiff on the ground that

"it authorized the jury to find a verdict for the plaintiff on a cause of action not stated in his petition."

In Buffington *vs.* The Atlantic and Pacific Railroad Company, 64 Mo., 246, the court said:

"The plaintiff grounds his action on an alleged defect in the construction of the engine, and he could only recover from an injury resulting from such defect. If the cause of injury was a defect in the track, and not a defect in the construction of the engine, he could not, without amending his petition, recover from a defect in the track."

See, also, Capital Bank *v.* Armstrong, 62 Mo., 59;
Chapman *v.* Callahan, 66 Mo., 299;
Carson *v.* Cummings, 69 Mo., 325;
C. C. and I. C. R. W. Co. *v.* Troesch, 68 Ill., 545;
Batterson *v.* Chicago and Grand Trunk Ry. Co., 8 Eng. and Amer. Ry. Cases, 123.

The issue the defendant was obliged to meet in the case at bar under the pleadings was, that the defendant had negligently furnished the plaintiff with an engine with a defective "pilot-plow," and that this defect in the pilot-plow was rendered dangerous by failure of defendant to keep its track clear from snow and ice. It was not contended by plaintiff either that the defective pilot-plow could have occasioned the accident except in conjunction with the accumulation of snow and ice, or the accumulation of snow and ice on the track could have occasioned it except in conjunction with the defective pilot-plow. They were inseparably joined both in the complaint and in the evidence.

The evidence shows clearly that Munro had full knowledge of the storm, of the general condition of the track, and that his means of knowing of the necessity of sending a snow plow ahead of his train were as full and complete as the defendant's. He had been on this particular run for a number of years, he was a capable en-

gineer familiar with the country, and he knew that no snow plow had been sent ahead of his train. (Rec., 18, *sup.*, *et seq.*)

It is an established rule upon this subject that a servant who has a reasonable opportunity to inform himself of the defects, is presumed, by remaining in the company's employ, to have assumed the risks of such defects.

Pierce on Railroads, 379.
Thompson on Negligence, 1008.

Houston, etc., Ry. Co. *v.* Fowler, Eng. & Amr. R., 504, was a case in which the plaintiff's intestate had been ordered to take a train out immediately after a storm; that the storm had washed out certain culverts and embankments by reason of which the train was derailed and plaintiff's intestate killed. The court held that the plaintiff had equal opportunities with the defendant of knowing the character of the storm and the effects it would be likely to have upon the track, "that he had an opportunity to see and know the extent of the rain," and under these circumstances he assumed any risk which might be attendant upon running his train.

In the case at bar, Munro had every opportunity of knowing the character of the storm and the danger attended therefrom that the company had, and he must be presumed to have assumed the risks. Again, there is no evidence to show that the company had not used proper, reasonable, and ordinary care in keeping its track clear.

Upon the pleadings and upon the evidence, or upon either or both, the question of negligence on the part of the company in not sending a snow plow in advance of the train or in allowing the snow and ice to accumulate upon its track should be eliminated from the case as an independent factor upon which plaintiff could recover.

So it is insisted that the law upon the facts of this case is decidedly with the road, without going over distinctly and separately the different errors specified in the Record (pp. 52–3–4–5), and the court should have directed the jury to find for the road as requested by it. The case when examined in the light of the authorities here presented, and those in the other cases referred to in our brief in 187, is sufficiently discussed upon its merits, and there is left but one more proposition to place before the court.

The trial court erred in refusing to instruct the jury, as asked by the road, "that the laws of Minnesota limit the amount of damages to be recovered in this case to $5,000." (Rec., 50–53.) Instead of that the court told the jury the recovery should be estimated under the laws of Montana, where Munro was killed.

It seems this action could have been brought in either Montana or Minnesota. The party had his selection as to the forum; that being so, it is but right and proper he should have only the remedy afforded by the law of the forum of his selection.

Wharton Conf. L., secs. 747–754; Ib., sec. 479;
Gould's Pl. (2d ed.), 104–112, 131, et seq.;
Story Comf. L., secs. 556, et seq.;
Nonce v. *Richmond, &c., 33 Fed. R., 429.*

If the party can take advantage of a remedy afforded in Minnesota, he must certainly take that remedy with the burdens ordinarily attached to it in that State.

Auct. Sup.; Martyn v. *Fabrigas, 1 Sm. Ldg. cases, 1027, and Eng. and Am. notes.*

Respectfully,

JAS. MCNAUGHT,
A. H. GARLAND,
H. J. MAY,
For Plaintiff in Error.

NUMBER 14,378.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D 1893.

TERM NO. 328.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

ALBERT L. BABCOCK,
AS ADMINISTRATOR OF THE ESTATE OF HUGH M. MUNRO,
DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This is an action brought originally in the state courts of Minnesota, and removed to the United States Circuit Court by this plaintiff in error, then defendant.

The action was brought to recover damages for the death of the deceased, Hugh M. Munro, which was alleged to have been caused by the negligence of the defendant in that action.

The specific acts of negligence complained of were the neglect and refusal to send a snow plow in advance of the train in question, to clear off the accumulation of snow upon the railway track (record, folio 6), and the defective condition of the pilot plow attached to the engine operated by deceased; by reason of which "said engine struck an accumulation of snow and ice which said defendant had carelessly and negligently allowed to accumulate upon its said railway track, and the pilot plow of said engine, by reason of its broken, loose and imperfect condition aforesaid, did ride upon said accumulation of snow and ice, thereby derailing said engine and throwing the same from said railway track, whereby the said Hugh M. Munro was instantly killed." (Record, fol. 7.)

The complaint also set out the law of the territory of Montana, within which territory the cause of said action was alleged to have occured, by which law a right of action is given to the personal representative of any person whose death is caused by the wrongful act of another person, for damages against the person causing or being responsible for the act which caused such death (fol. 8).

To this complaint a demurrer was interposed, which was overruled.

An answer was then filed by which it was admitted that defendant was a corporation and was the owner and operator of the line of railway in question; that said de-

the evening, but was obliged to wait for want of an engine; that some time after midnight deceased was directed to take the engine in question, which was designated as number 161, and proceed with the train; that in attempting to back the engine to the train dispatcher's office in Livingston he got "stuck" in a snow drift and it had to be shoveled out; that the engine with the train attached was started on its course at 2:55 in the morning; that at about 3:25 of the same morning it reached a station called Elton, where it met a west bound train and thence passed eastward to a station called Big Timber, where further orders were received; that further east and about two miles west of a station called Gray Cliff there was a cut in the railway about 180 feet long; that eastward of said cut there was a depression in the natural surface of the ground which made it necessary to extend the railway track upon an embankment which was ten or twelve feet high at a point 180 feet east of the end of the cut; that at the time said engine and train reached said cut the snow was about three feet deep in said cut; that at that time the snow was drifting at such a rate as to fill such a cut in about half an hour; that about two hours had passed from the time said west bound train passed said cut until the time the engine and train in question reached the same cut. From the testimony shown in the bill of exceptions it appeared without dispute that the whole train was derailed within 360 feet of the west end of said cut; that said engine and the water tank or tender attached to it were overturned upon said embankment, and that the derailment of said train and the overturning of said engine and tender were caused by the depth of the snow in said cut, but the witnesses were not agreed in respect to the manner in which said derailment and overturning was caused. It was also shown by the uncontradicted evidence found in the bill of exceptions that the pilot plow attached to

it was error to charge the jury that if defendant was negligent and that its negligence caused the death of the engineer, Munro, then plaintiff, was entitled to recover. This was correct as a general proposition of law. The second assignment was that there was error in an extract quoted from the charge as found in folio 105 of the record. This quotation contains no statement of any proposition of law, and of course is not of itself any foundation for a claim of error. We are therefore justified in treating all three of these assignments as presenting the same clause, namely, that the whole case ought to have been taken from the jury.

In this view it should be remembered that this is not a question of whether or not the jury made any mistake in the result they reached, but solely whether it was error of the court to submit any question to the jury. There is no federal statute like the state law of Minnesota permitting a verdict to be set aside because it is against evidence, and even if there were authority for such a review of the verdict it could not be had upon this record which does not purport to contain all the evidence and which shows affirmatively that many items like the diagrams and illustrations referred to by the witnesses are omitted from the bill of exceptions.

The record shows that in several particulars there was a dispute between the parties in respect to the material facts in issue.

Upon the question whether or not there was negligence in failing to send a snow plow ahead of the train in question, there was evidence from which the jury would be justified in finding that omission was negligence and that not only reasonable prudence but the custom of this very railroad company required such precaution. Testimony of Smith (Record folio 49).

It is true that this testimony is partially contradicted by another witness, who was inquired of whether it was

questionary, said whose reply was: "It is [illegible] customary to run snow plows ahead of [illegible] This was an expert witness [illegible] pany, and it is to be noted that [illegible] answer carefully avoided the question [illegible] perhaps required such a construction [illegible] actual custom of this very company. Testimony O'Rourke (f. 65.)

It is true that the same witness in answer to [illegible] question in the most fair sense that the use of [illegible] plow was not to prevent accidents, but [illegible] other witness was on cross-examination [illegible] that such use of snow plow would [illegible] accidents. Testimony of Doherty (fol. 78.)

It is also true that the last named witness [illegible] opinion that it was not necessary to send [illegible] on account of the no recent passage of [illegible] train. The testimony that two miles had [illegible] the west-bound train had passed the point [illegible] and that the storm was raging to such [illegible] like the one where the deceased lost [illegible] hour, was uncontradicted. It was then the [illegible] prerogative of the jury to decide this dispute [illegible] determine whether the exclusion to send out [illegible] plow in advance of the train was or was not [illegible]

Again, it was claimed that there was conflict [illegible] dence on the question whether or not the [illegible] pilot plow attached to the engine had been [illegible] There was affirmative testimony that [illegible] tinued until the evening of the [illegible] 30 hours of the accident, and that the engine was [illegible] on the road on the 9th and some of those [illegible] other hand the master mechanic, [illegible] he directed one of the boiler makers to [illegible] irons which were loose, (fol. 85), but [illegible]

dence that the boiler maker obeyed the direction, and there was testimony to show that both the angle irons were entirely missing as late as the evening of the 8th.

Plaintiff in error seemed to rely on the trial upon the absence of direct testimony to prove the negative that the pilot plow was not repaired between the evening of the 8th and the time it was taken out. The testimony does cover that interval pretty well (fol. 46, 47).

It is a familiar principle of law that when a condition is shown to have existed at one period of time the same condition may be presumed to have continued. The positive evidence showed the bad repair of that pilot plow to have continued from some time between Christmas and New Year to within thirty hours of the accident, and that the engine was in use at least a portion of that intervening time. From these facts alone the jury would have been justified in finding that the same condition had continued. This presumption is strengthened by the fact that the accident itself was the natural result of such condition. The jury had also the right to consider that the appliance in question was during the whole time in the control of the railroad company, and if there had been any repairs that fact could have been shown by the testimony of its own servants and indeed by the records in its own books. The same thing may be said of the testimony as to the condition of the plow after the accident. Whether the braces were loose or not could only be told by the man who took the plow from the engine.

That witness was not produced.

All these questions were proper for the consideration of the jury.

There was another dispute on the trial and that was in respect to the manner in which the derailment was effected. To avoid the claim that the accident was caused by the defective condition of the pilot plow the plaintiff in

[illegible] made the claim that the derailment of the [illegible] was caused by the baggage car. [illegible] This was the inference drawn by the [illegible] condition of the wreck. No witness [illegible] other means of knowledge. [illegible] have known about it were killed in the wreck. [illegible] a matter peculiarly within the province of the [illegible] was for them to say whether they believed it [illegible] probable that the baggage car should have [illegible] than that it should follow. That theory of the [illegible] not avoid the ground of action because it [illegible] the derailment was caused by the accumulation of [illegible] in the rut, and if the jury were satisfied that it [illegible] ligence to permit such accumulation it was [illegible] whether the negligence produced the derailment of [illegible] engine by direct action or through the [illegible] of the baggage car. Indeed, the charge of the court [illegible] given near the end of folio 93 of the record, that "[illegible] the accident occurred by reason of the negligent and [illegible] less failure of the defendant to send a spare plow in advance they will find for the defendant," would indicate that the verdict was found on that very ground. That theory was open to the very serious if not fatal objection that if the pilot plow had been in good condition and doing its proper work there would have been no obstruction left on the track to derail the baggage car, and even though the greater weight of the engine kept it [illegible] the track the pilot plow must have ridden over the rail and made the packing which caused the baggage car to leave the track. It was a "condition" and not a "[illegible]" that was encountered, and the jury was the only [illegible] that condition.

On all the points of dispute there was abundant [illegible] money to submit to the jury. There [illegible] alternative that there was [illegible]

facts to take the case from the jury. The only question that can come up of this nature is the effect of the knowledge by the deceased of the negligence which caused his death. It is true that he knew of the condition of the pilot plow before he was taken sick, and had reported that to the proper officer of the company, but after he came back to duty he had no means of knowing its condition, for he found it in the roundhouse after midnight, when the undisputed testimony showed that on account of the escaping steam it was so dark as to prevent examination (fol. 46). Having given notice to the company, he had the right, after a sufficient time had elapsed to make the repairs, to assume that the repairs had been made. This was the charge of the court below upon the request of plaintiff (fol. 93). No exception was taken to that charge, and, indeed, none could have been taken, because it is a proposition of law correct in principle and supported by the authority not only of the courts of Minnesota but of numerous other tribunals as well.

Hugh us. Railway Co., 100 U. S. 213.
Green vs. M. & St. L. Railway Co., 31 Minn., 248.
Sherman & Red, on Neg., Sec. 96.
Thompson on Neg., 1009, 1010.
4 Am. and Eng. R. Cases, 637.
315 Am. and Eng. R. Cases, 218.

The deceased came exactly within this rule. He reported the defects between Christmas and New Years, and without any fault of his was prevented from having means of personal knowledge. Whether sufficient time had elapsed was for the jury to determine, and their attention was specially called to that point in the charge as given.

The deceased also knew that no snow plow was sent in advance of his train. There is nothing in the record to

show that he became aware of [illegible] his train and he had no [illegible] necessary to send the snow plow [illegible] was his first trip after his [illegible] him within the principle that [illegible] edge of the negligence of his employer, [illegible] in the service he is held to assume the risks of [illegible] There is here no necessity for any discussion of [illegible] puted principle. No such point was made [illegible] trial. The evidence fails to show that the deceased [illegible] any knowledge of the negligence in question until after [illegible] was too late to abandon the service. After starting on [illegible] trip he had no right to abandon his train.

The principles which control the submission of such questions to juries are so familiar that we have not [illegible] it necessary to cite authorities. The line of distinction [illegible] perhaps more hard to define than to enunciate, but [illegible] there is no view of the facts in this contention which would justify the taking of the case from the jury.

II.

The seventh assignment of error is the refusal of the Court to give the third request of defendant which was:

"The Court instructs the jury that unless they find that it was customary for defendant company to send a snow plow in advance of the trains running east from Livingston during storms of this character, and that [illegible] this the accident occurred by reason of the negligent and careless failure of the defendant to send such snow plow in advance they will find for the defendant."

This was refused and in its place the following was given. (Fol. 99.)

"The Court instructs you that unless the accident occurred by reason of the negligence [illegible] the defendant to send a snow plow in advance [illegible] find for the defendant. It is claimed that a snow plow should have been sent in advance of the [illegible]

would have cleared the track, and that the failure to send the snow plow in advance was negligence on the part of the company."

The request was faulty inasmuch as it made the measure of diligence required of a railway company depend on its own customs. Such a rule of law would make the continuous negligence of a railroad company an excuse for the non-performance of its plain duty.

III.

The third, fourth and sixth assignments of error raise the question of whether the measure of damages is controlled by the law of Montana, where the cause of action occurred, or that of Minnesota where the trial was had.

We are guided by the law of the place where the cause of the action arose in our inquiries as to the rights of the parties, and we look to the law of the forum when we come to determine the form of the remedy. This is elementary and, we suppose, unquestioned.

Defendant in error invokes the familiar rule that "wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

There is no exception to this rule, although statutes that are criminal or penal in their nature will only be enforced in the state which enacted them.

Dennick vs. R. R. Co., 103 U. S., 11, is an action in favor of an administrator appointed in New York. In that action, the right given by the laws of New Jersey was enforced by the courts of New York. This court, Miller, Justice, says:

division of the Code of Civil Procedure of Montana, which sections are set out in the complaint and admitted in the answer.

A special exception is taken to the refusal of the court below to charge that the law of Minnesota limited the damage to five thousand dollars. The law of Minnesota was changed between the time of the death of the deceased and the time of the trial. At the time of the accruing of the cause of action the statutes of Minnesota limited the amount of damages in such actions to five thousand dollars, but before the time of the trial that limit had been raised to ten thousand. It is a general principle that where the rights of parties are controlled by the law of the place of trial the law that so controls is that law as it is at the time of trial.

Exception is taken to the statement of the law of Minnesota. This statement was made at the request of the plaintiff in error in its second request (fol. 98). It was a true statement of that law. A statement of law specially called for cannot be assigned as error by the party calling for it. Moreover, the statement cannot be made a ground for setting aside this verdict, because it does not appear that it was injurious. By the law of Montana there was no limit to the amount a jury might award. The statement that the law of Minnesota put a limit to that discretion cannot be said to injure this plaintiff in error.

IV.

The only remaining complaint is that contained in the eighth assignment—the refusal of Court to give defendant's fourth request, which was:

"The Court instructs the jury that unless they find that the defendant carelessly and negligently furnished to the deceased engineer a plow attached to his engine, the iron

[illegible]

In the place of that request the court gave [illegible]

"The court instructs you that [illegible] defendant negligently and [illegible] deceased employees [illegible] rods and bolts of which were [illegible] sufficient, and by reason of said [illegible] the engine struck the snow in the [illegible] the engine and tender were [illegible] thereof, which caused the accident in question, [illegible] defendant would be entitled to a verdict [illegible] that the snow had accumulated in the [illegible] cut that when the engine struck it the [illegible] condition in which it was, it was [illegible] the accumulation of snow being as [illegible] described by some witnesses, it was [illegible] engine off the track from the fact that [illegible] the engine could not ride [illegible] it. [illegible] unless the cause of the derailment [illegible] the engine was the [illegible] it could not clear the cut from the snow which [illegible] mulated there; but the engine was thrown [illegible] by the death caused—unless that is [illegible] the satisfaction of the jury the [illegible] entitled to a verdict." (Folio 98, 100.)

It is very difficult to discover any material change [illegible] the charge as given from that indicated in the request. The clause, "by reason of which condition the said [illegible] was loose and insufficiently secured [illegible] engine," found in the request is [illegible] result of the clause, "the iron rods and bolts [illegible] broken, imperfect and insufficient," found [illegible] given. If that was [illegible] that unless the cause of the derailment [illegible]

condition of the plow, the defendant would be entitled to a verdict, covers all that the party was entitled to have in that part of the charge.

The reference to the accumulation of the snow in connection with the condition of the plow cannot be regarded as a modification of the request. If it is a modification, it is clearly right, because it was the accumulation of the snow that caused the insufficiency of the plow to work the injury that resulted.

There is no error shown in the record.

REUBEN C. BENTON,
FRANK HEALY,
Attorneys for ~~Respondent~~ Defendant in Error.